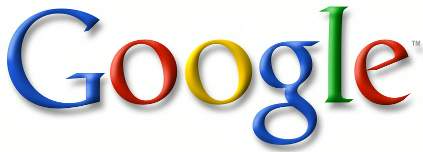

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REPORTS OF CASES

DECIDED IN THE

2650

COURT OF APPEAL,

ON APPEAL FROM THE SUPERIOR AND COUNTY COURTS—APPEALS IN INSOLVENCY— AND ELECTION CASES.

BY

J. STEWART TUPPER,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. IV.

CONTAINING THE CASES DETERMINED FROM THE 3RD FEBRUARY, 1879, TO THE 26TH JANUARY, 1880, WITH A TABLE OF THE NAMES OF CASES ARGUED, A TABLE OF THE NAMES OF CASES CITED, AND A DIGEST OF THE PRINCIPAL MATTERS.

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JUDGES

OF THE

COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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COURT OF APPEAL.

NELLES V. PAUL.

Insolvent Act, 1875—Fraudulent preference.

The insolvent paid a note to the holder at the request of the sureties who had given a mortgage to secure the amount of the note within thirty days of his being placed in insolvency. It appeared that when the sureties made this request neither they nor the creditor who held the note and mortgage knew or had probable cause for believing that the insolvent was unable to meet his engagements in full.

***Held*, reversing the decree of Proudfoot, V. C., that the payment was not void within the meaning of the 134th section of the Insolvent Act of 1875, and that the assignee had no right to have the mortgage reinstated as against the sureties.**

THIS was an appeal from a decree of Proudfoot, V. C.

It appeared that one Marvin Knowlton, within thirty days prior to his insolvency, paid an overdue note to the defendant Fallows, at the request of the defendants S. N. Paul and S. Paul, who had given a mortgage to secure the payment of the said note. The plaintiff, who was the assignee in insolvency, filed a bill against Fallows and the Pauls praying that the mortgage might be reinstated on the lands: that Fallows might be ordered to pay back the amount received by him, or that the defendants, the Pauls, the amount so paid for them.

The case came on to be heard before Proudfoot, V. C., at London, in May, 1877.

Boyd, Q. C., for the plaintiff.

C. Moss for defendant Fallows.

Meredith Q. C., for defendants Paul.

Proudfoot, V. C.—So far as the defendant Fallows is concerned, I think the bill must be dismissed, with costs. There is no case made against him on the evidence, and I think there is no sufficient case made out on the pleadings.

The question as to the defendants, the Pauls, is a much more difficult one—one that is very difficult to reconcile with the provisions of the Act of Parliament, and one's knowledge of what is just and fair between parties; and I am afraid that the construction contended for by the plaintiff will have to be enforced.

I think that so far as the Pauls are concerned the contention of Mr. Boyd is right, that the case of *Churcher* v. *Cousins*, 28 U. C. R. 540, and several others under section 134 of the Insolvent Act, shew that persons in the position of those here are to be considered in the light of creditors of the insolvent, and the intention of the insolvent law was to maintain and promote equality amongst creditors in the distribution of the assets of the insolvent. They are in the same position as a creditor, and in no better condition.

Then, if it is a transaction under the 133rd section there is no question of notice at all. Whether they had notice or not seems to be immaterial under the decision of *Davidson* v. *Ross*, 24 Gr. 22, and other cases of that class; but the mere fact of the payment made by the insolvent, and the discharge of the creditor within the thirty days involves an implication of legal fraud, at all events so as to void the transaction; then the only way in which the Pauls could escape that consequence would be, if there was no evidence shewing that they had, or if they were able to shew that they had not, requested the payment of the security upon which they were sureties for the insolvent.

There is a great deal of contradictory evidence as to this. I cannot say that the Pauls have made out their case satisfactorily. There is the evidence of Paul and Mrs. Paul on the one hand, and there is the evidence of the insolvent Knowlton on the other hand. If there is any person who is indifferent in the matter, I should say

it is Knowlton. I do not place a great deal of reliance on his evidence, however, where it does not coincide with the other witnesses; but it happens to coincide on this occasion with what we feel would be the conduct of the parties. Paul has his property mortgaged for Knowlton's accommodation. He asks him for the mortgage on Friday night, supposing it had been discharged. He is told then that it has not been discharged. It is hardly possible to avoid the conclusion that he told Knowlton, and Knowlton says he did, that he wanted the mortgage paid. In that case, it seems to me, that the evidence of Knowlton is supported by what would naturally be the conduct of the parties, so that I ought to give credit to it.

I think therefore that the payment of the security being made at the request of the Pauls, that they cannot hold it to the prejudice of the rest of the creditors. I apprehend then there would have to be a decree giving effect to the plaintiff's contention as to making the defendants, the Pauls, pay this $2,000, or make it a charge on the land which has been relieved by the payment of the mortgage to Fallows.

Usual decree with costs.

The defendants, the Pauls, appealed from this decision.

The case was argued on the 17th January, 1879 (*a*).

Meredith, Q. C., for the appellants. The learned Vice Chancellor proceeded solely upon the ground that the fact that the appellants requested Knowlton, the insolvent, to pay off the mortgage, made the payment void, but it is submitted that even if such request were made, it is wholly immaterial in the absence of knowledge by Fallows of the inability of the insolvent to meet his engagements in full, or probable cause for believing the same to exist, which was clearly shewn. And if the payment is, for the purposes of the section, to be treated as a payment to the appellants, it is also sufficient to prove, as the evidence

(*a*) *Present.*—Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.

conclusively establishes, that they were equally ignorant of Knowlton's being in insolvent circumstances: *In re Wallace*, 29 U. C. R. 313. This case is clearly distinguishable from *Churcher* v. *Cousins*, 28 U. C. R. 540, and *Churcher* v. *Stanley*, 24 Gr. 216, as the payment here was not made to the appellants. The appellants were not creditors of the insolvent within the meaning of the 133rd section.

Boyd, Q. C., for the respondent. The evidence does not bear out the appellants' contention, that the Pauls were ignorant of Knowlton's insolvent circumstances. It matters not whether the insolvent swears that he was solvent if the facts shew, as they do here, that he must have made an assignment if compelled to pay his debts. Although this case is perhaps not within the words, it certainly is within the spirit of the Act. The evident effect of the payment was to give a preference to the appellants. They clearly occupied the position of creditors within the meaning of the Act. He cited *Been* v. *Laflin*, 5 B. R. 333; *Bartholow* v. *Bean*, 18 Wall. 635; *Petty* v. *Crooks*, L. R. 6 Q. B. 790; *Pritchard* v. *Hitchcock*, 6 M. & G. 151.

February 3, 1879 (*a*). Moss, C. J. A., delivered the judgment of the Court.

The learned Judge, in pronouncing the decree appealed from, proceeded upon the ground that the payment to the defendant Fallows having been made at the request of the appellants, was contrary to the provisions of the Insolvency Act. He observed that if the transaction was one falling under the 133rd section, there was no question of notice, but that the mere fact of the payment within the thirty days involved an implication of legal fraud, from the consequences of which the appellants could only escape "if there was no evidence shewing that they had, or if they were able to shew that they had not, requested the payment of the security upon which they were sureties for the insolvent."

(*a*) *Present.*—Moss, C.J.A., Burton, Patterson, and Morrison, JJ.A.

We see no reason for differing from the finding of the learned Judge upon the evidence that the payment was made at the request of the appellants. He prefers the evidence of the insolvent, and he very justly remarks that it is supported by a consideration of what would naturally be the conduct of the parties. However strongly convinced they may have been of the solvency of Knowlton, it was likely enough that when they learned that the promissory note, for payment of which their property had been pledged, remained overdue and unpaid, they should have requested Knowlton to put an end to their liability. If the case was governed by the 133rd section, the want of notice to the appellants of the condition of the insolvent's affairs would, as the Vice Chancellor has pointed out, be immaterial. But in the case of *Smith* v. *Hutchison*, 2 App. 405, this Court has already held that the case of payment is dealt with by the 134th section and not by the 133rd section. My brother Burton in his judgment states the three ingredients which must co-exist in order to make a *payment* void: the insolvent must be unable to meet his engagements in full: the person receiving the payment must know of such inability, or have probable cause for believing it: and the payment must have been made within the thirty days. Now, in this case the first and the third of these conditions are clearly found, but the second is absent. The learned Vice Chancellor must have thought there was no evidence of knowledge, or probable cause for belief, because he would not otherwise have referred to the immateriality of notice. Indeed, this is the only conclusion which the evidence warrants. The insolvent asserts that he did not deem himself insolvent. The appellants declare most positively that they had no suspicion that he was unable to meet his engagements. No one proves that there was a whisper even among the mercantile community, breathing upon his solvency. Until the last moment he appears to have been able to obtain credit, and so far as we can judge to have worn the garb of prosperity. The grounds of suspicion which have been put

forward are too hypothetical and shadowy to form the basis of judicial action.

The case, therefore, is resolved into the following propositions. The appellants, being sureties to Fallows for the payment of an overdue note made by Knowlton, requested him, on the immediate eve of his being placed in insolvency, to pay it, and relieve them from further liability. This request they made without knowing or having probable cause for believing that he was unable to meet his engagements in full. With this request he complied, and thus obtained the discharge of this mortgage to the creditor. It has been held that the money cannot be recovered by the assignee from the creditor as to whom the bill has been dismissed, but the sureties are ordered to pay the amount to the estate, and it is made a charge upon the land. The result of this decision is, that while the money cannot be recovered from the mortgagee, to whom it has been paid, the mortgage which he held has been assigned by the Court to the assignee in insolvency. We do not think that there is anything either in the express language of the Act, or in its policy, which forces the Court to a conclusion, at once so anomalous and so unjust. If Fallows had requested Knowlton to pay the note, and he had complied, surely his position would have been no worse than upon the payment being made without a precedent demand. Why then should the sureties be in a worse position because they requested their principal to do what he was bound to do? In this case they seem to us to have been in precisely the same position, for they were equally ignorant of Knowlton's inability to meet his engagements.

That single consideration seems to be sufficient for the determination of this appeal. It is, therefore, unnecessary to consider the question of whether a surety is to be deemed a creditor within the sections of the Act which have engaged our attention. It may be that that question can never be of much practical importance, because if a transfer of property or a payment to a surety be made, it may be held that if it were not made to him as a creditor, it was

gratuitous. Upon this point, however, which was only incidentally referred to at the bar, we refrain from expressing any decided opinion.

But if these difficulties were surmounted, the plaintiff would still have to encounter the serious objection, that this payment was not made *to* the appellants. It has been decided that the amount paid cannot be recovered back from the person to whom it was paid, and yet this is the remedy which the Act expressly gives. That circumstance distinguishes the case from *Churcher*, v. *Cousins*, 28 U. C. R. 540, and *Churcher* v. *Stanley*, 24 Gr. 216, the reasoning in which it is unnecessary to consider.

We think that the appeal must be allowed, with costs, and the bill dismissed, with costs.

Appeal allowed.

FISKEN V. BROOKE ET AL.

Equitable execution.

The testator bequeathed to J. E. B. and his wife, B. J. B., certain real and personal estate, upon the following trust : "In the first place, to and for the support and maintenance of himself and his wife in a fit and suitable manner according to their rank and station, during their joint lives and during the life of the survivor of them ; secondly, for the support, education, and maintenance of the children of the said J. E. B. and B. J. B., now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said J. E. B. and B. J. B.

Power was given to the defendant and his wife jointly during their lives, and to him if he was the survivor, but not to her if she was the survivor, to sell the lands, mortgages, and all other securities, and to stand possessed of the proceeds upon the same trusts. Further power was given to them jointly and to the survivor to divide the real and personal estate or the proceeds thereof, or so much thereof as remained unexpended and unappropriated in carrying out the trusts, between the said children and their said heirs, if any, in such manner and in such proportion as to them might seem fit, or to exclude any of them entirely from any benefit or portion thereof if they should see fit so to do, or to convey or make over to any of them by way of advancement any portion of the same to become theirs absolutely.

Held, (reversing the decree of PROUDFOOT, V. C.,) that the gift was for the benefit of the defendant J. E. B. and his wife jointly, and that his interest could not be attached by an execution creditor.

Held, also, that the defendant had no estate in the lands corresponding to an estate at law : at most he had but a charge upon an income arising out of a mixed fund, the amount of which was in the discretion of the trustees, and the case in this aspect was within the rule in *Gilbert* v. *Jarvis*, 16 Gr. 265.

The object of an equitable execution is to impose on the equitable interest the liability which would attach at law on a corresponding legal interest.

An assignee in insolvency may assert rights to the estate of the insolvent which cannot be enforced at the instance of an execution creditor.

Godden v. *Crowhurst*, 10 Sim. 655, considered and followed.

Buchanan v. *Brooke*, 24 Gr. 585, overruled.

THIS was a petition filed for equitable execution against the interest of the defendant, J. E. Brooke, in the real and personal estate devised to him by the last will and testament of Daniel Brooke, the elder. The plaintiff had obtained a decree against J. E. Brooke, on which he had issued execution against goods and lands, but had realized nothing.

The material clauses of the will were as follows:

"I will, devise, and bequeath, unto my son, John Edmund Brooke, of the town of Chatham, in the county of Kent and province aforesaid, Esquire, and Betsey Johnston Brooke,

his wife, all my estate, real as well as personal, consisting of lands, houses and tenements, mortgages, rents, stocks, bills, bonds, notes, and other securities for payment of moneys, and household effects, situate, lying, and being in the city of Toronto, and county of York, west of Yonge street, in the said city and county, also in the county of Peel, also in the county of Simcoe, also in the city of Hamilton, also in the county of Wentworth, also in the county of Kent, all in the province of Canada: to have and to hold the same to said John Edmund Brooke, and his wife, Betsey Johnston Brooke, and to the survivor of them to, for, with, and upon the uses, trusts, limitations, provisoes, powers, conditions, and limitations, hereinafter provided and expressed, of and concerning the same, that is to say, in the first place, to and for the support and maintenance of the said John Edmund Brooke, and his wife, Betsey Johnston Brooke, in a fit and suitable manner, according to their rank and station, during their joint lives and during the life of the survivor of them: Secondly, for the support, education, and maintenance of the children of the said John Edmund Brooke and Betsey Johnston Brooke, now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life. and at the discretion of the said John Edmund Brooke and Betsey Johnston Brooke, and after their death, then to all their children, share and share alike, as may survive them, and the heirs of the bodies lawfully begotten of such as may not survive, forever; provided the said John Edmund Brooke and Betsey Johnston Brooke, or the survivor of them, shall not, by any instrument or instruments, under their hands and seals, or the hand and seal of such survivor, make any other distribution of the same between their said children and their said heirs, except as they are hereinafter empowered to do; and thirdly, as to my moneys on deposit in the Bank of Upper Canada, and eleven railway shares which I have in the New York Central Railway, in the state of New York, I also hereby give and bequeath the same to the said John Edmund Brooke and Betsey

Johnston Brooke, in trust, to be divided into ten equal shares, six of which are to be held by them upon the same trusts, uses, and conditions, for them and their said children, as hereinbefore provided, and the remaining four shares to the use and benefit of the children of my son Daniel Osburne Brooke, and his wife, Emily Brooke, to be paid over and delivered to the said parties within one year after my decease, and to be held by their said parents upon the trusts, and to the uses hereinafter contained and expressed in my bequest to them; and I hereby empower the said John Edmund Brooke, and his wife, Betsey Johnston Brooke, jointly during their joint lives, but not either of them, and the said John Edmund Brooke, if he should survive the said wife, but not the said Betsey Johnston Brooke, if she should survive her said husband, any or all of the said lands and tenements, mortgages, and all other securities, to sell, convey, and absolutely dispose of, and, for that purpose, any deed or deeds, to execute, sign, seal, and deliver, and any mortgage or mortgages, or other securities, to accept and take, securing the purchase money, or any part thereof, at such time or times as they or he may think fit, and to stand possessed of the said proceeds of such sale or sales, to and upon the same trusts, uses and conditions as hereinbefore provided with respect to my bequest to them."

"And I hereby further empower my son, John Edmund Brooke, and his wife, Betsey Johnston Brooke, during their joint lives, or the survivor of them, by instrument under their hands and seals irrevocable, to take effect after their death, or sooner if they shall think fit, to divide said real and personal estate, or the proceeds thereof, or so much thereof as may then remain unexpended and unappropriated in carrying out the said trusts, between their said children and their said heirs, if any, in such manner and in such proportion as to them may seem fit, or to exclude any of them entirely from any benefit, or any portion thereof, if they shall see fit so to do, or in the meantime, by any such instrument, to convey and make over to any of them,

by way of advancement, any portion of the same, to become theirs absolutely from thenceforth forever; provided always, that nothing herein contained shall be construed to allow the said John Edmund Brooke, and his said wife, or either of them, to mortgage or create any lien on any part of the said bequest to them, or in any way encumber the same by debts, either already contracted, or to be contracted by them, or either of them, in any way whatsoever."

The defendant, J. E. Brooke, by his answer, submitted that he had no separate interest in the estate devised to him by his father, such as would entitle the plaintiff to an account of the rents and profits of the same.

Proudfoot, V. C., before whom the petition was heard, made an order, delaring that the plaintiff's claim formed a lien and charge upon the interest the defendant, J. E. Brooke, had acquired under his father's will, and that the plaintiff was entitled to equitable execution out of that interest.

The defendants appealed.

The case was argued on the 17th January, 1879 (*a*).

McCarthy, Q.C., and *Hoskin*, Q.C., for the appellants. The cases upon the question for decision on this appeal are very conflicting, but the distinction appears to be, whether or not the trustees have a discretion, in other words, whether the gift is vested or not. It seems to be well settled in the case of bankruptcy, that where the insolvent has an actual and vested interest, the assignee is entitled to it: *Lewin* on Trusts, 87, 88, 6th ed. Where, however, the trustees have any discretion the Court will not interfere. There can be no question that the interest of J. E. Brooke was not vested in him in such a way as to make it liable to be attached at the suit of a creditor. He and his wife possessed the fullest discretion under the will. They are joint trustees, and the estate and income thereof are vested in them jointly in trust, not in any way separate,

(*a*) *Present.*—Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.

for the support and maintenance of themselves and their children, according to their rank and station in life, and at their discretion, and the Court of Chancery had no power to declare J. E. Brooke entitled to any separate interest and to administer the trusts of the will. No part of the fund is of necessity payable to John E. Brooke alone; but the same may be applied in the purchase of necessaries for him. The effect of the decree is to interfere with him in the management of the trusts of the estate, and to place it in the hands of his wife alone, or in the hands of a receiver, which the Court below had no power to do on the application of a party who had no interest in the estate under the the will: *Gilbert* v. *Jarvis*, 16 Gr. 265; *Horsley* v. *Cox*, L. R. 4 Ch. 92; *Blake* v. *Jarvis*, 16 Gr. 295. The decree will affect the position of the wife and children, for it proceeds upon the principle that they are only entitled to a certain definite share of the income, and her husband to the remainder; but she is entitled to the whole income, if she thinks it necessary for her support and maintenance, and any she may not think necessary she holds in trust for her children. One of the trusts of the will is, that the trustees shall not mortgage or create any lien on the estate and income thereof, and as the estate is jointly vested, no debt of J. E. Brooke can attach. The decree may become nugatory, as the trustees can dispose of the estate amongst their children, and thus deprive themselves of all interest therein, and the Court will not make a decree which can be at once rendered abortive: *Snowdon* v. *Dales*, 6 Sim. 527. At any rate, the decree is too wide, and gives the respondent a lien upon the income of the personalty as well as the realty, which cannot be supported. They cited *Brophy* v. *Bellamy*, L. R. 8 Ch. 799; *Collins* v. *Vining*, 1 Cooper 472; *Rippon* v. *Norton*, 2 Beav. 63; *Piercy* v. *Roberts*, 1 M. & K. 4; *Page* v. *Webb*; 3 Beav. 20; *Twopeny* v. *Peyton*, 10 Sim. 487; *Godden* v. *Crowhurst*, 10 Sim. 655; *Wallace* v. *Anderson*, 16 Beav. 533; *Lord* v. *Bunn*, 2 Y. & C. 98; *Austin* v. *Austin*, L. R. 4 Ch. D. 233; *Buchanan* v. *Brooke*, 24 Gr. 585.

Boyd, Q.C., (*Bain* with him,) for the respondents. There is undeniably a difficulty in working out the doctrine of equitable execution where there is any discretion, as is shewn by the cases cited by the appellants, but this is not the case where there is a vested interest as here. The law is clear that any interest which the debtor could deal with for his own benefit is exigible. There is nothing in the will pointing to a joint enjoyment. Under the will J. E. Brooke is entitled to a beneficial interest, and the respondent justly asks to have equitable execution against it. The fact of the execution debtor being also one of the trustees named in the will cannot affect the right of the respondent to have this beneficial interest made available to satisfy his claim. The amount which is necessary to support a person in a certain condition in life is capable of being ascertained and no discretion is to be implied because that matter is left to the trustees: *Paine* v. *Chapman*, 6 Gr. 338. The order appealed from merely deals with the interests of J. E. Brooke, and does not interfere with rights of the wife and children. They cited *Younghusband* v. *Gisborne*, 1 Coll; 400; *Holmes* v. *Penney*, 4 K. & J. 98; *Kerr* v. *Sidding*, 28 Beav. 634; *Robertson* v. *Beamish*, 16 G. 676; *Spence's* Eq. Jur. 90, 91; *Theobald* on Wills 319; *Jarman* on Wills 26, 27; *Tudor's* L. C. 866, 867. A. J. Act, sec. 11.

February 3rd, 1879 (*a*).—Moss, C. J. A.—In making the order appealed from, the learned Vice-Chancellor simply acted upon the authority of *Buchanan* v. *Brooke*, 24 Gr. 585, in which the same point had been decided.

It was very properly conceded upon the argument before us, that the scope of the order was too large. It declares that the plaintiff's claim forms a lien and charge upon the interest the defendant John Edmund Brooke has acquired under his father's will, and that the plaintiff is entitled to equitable execution out of that interest. Now, if the exe-

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(*a*) *Present.*—Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.

cution debtor has any separate or independent interest in the estate of the testator, it is a charge for his maintenance and support upon the income derivable from the whole *corpus*, which consists of personalty and realty. With regard to the former class of property, it seems to be impossible to withdraw this case from the operation of the principles upon which *Horsley* v. *Cox*, L. R. 4 Ch. 92, was decided. If the testators' estate had consisted wholly of personalty, and the execution debtor was entitled to a definite share of the annual proceeds, that case shews that it could not be reached by a Court of Equity for the benefit of the execution creditor. So far, therefore, as the order assumes to fix a charge upon any interest coming to the defendant out of personalty, it is admitted that it grants relief beyond the power of the Court.

But it is argued that the order is partially right, although not sustainable in its entirety. This is founded upon the assumption that the defendant has an interest in the lands out of which equitable execution should be awarded. I shall consider that argument more fully in the sequel, but at this point I desire to observe that I cannot perceive any satisfactory distinction between this case and *Gilbert* v. *Jarvis*, 16 Gr. 265. In that case, as I understand it, the execution debtor was alleged to have a charge upon the testator's estate for arrears of an annuity, and for advances made in her capacity of trustee. At the time the bill was filed, the personalty was exhausted, so that the lands were the only source to which she could have resorted for payment. The question, therefore, was free from any embarrassment that may be created by the existence of a mixed estate, and in that respect more favorably presented for the plaintiff. Moreover, the amount to which she was entitled was definite and easily ascertainable. Yet relief was denied to the plaintiff. When the elements of the present application are analysed, it appears to be neither more nor less than an attempt to obtain by the assistance of a Court of Equity a kind of

garnishment of an amount alleged to be claimable by the debtor out of the estate of a deceased person, and this is precisely what *Gilbert* v. *Jarvis* decides to be impossible. The plaintiff's real claim, in whatever garb it may be shrouded, is, that he is entitled to attach an annual sum payable to his execution debtor. The circumstance that, in *Gilbert* v. *Jarvis*, the plaintiff desired to reach unpaid *arrears* was favorable, rather than prejudicial, to his prospects of success. There appear to be graver difficulties in the way of binding future instalments. But it is suggested that the remedies of a creditor have since been enlarged by legislation. To sustain this position reference is made to the Administration of Justice Act; but I cannot concur in the view that it has made any alteration in the law by which this question is governed. It seems to me that there is nothing in that enactment to show that what *Gilbert* v. *Jarvis* decided could not then be done can now be done. We have not been referred to, nor have I found, any particular clause enlarging the power of the Court of Chancery to give equitable execution. It does in the 11th section enable a judgment creditor at law, who alleges that his debtor has an interest in land, which cannot be sold under legal process, but could be rendered available in Equity for satisfaction of the debt, to obtain a summary remedy for the realization of this interest, but clearly this leaves untouched the question whether a particular interest is attachable in Equity. My own opinion, therefore, is, that in this Court the point is concluded by authority. But the argument before us was conducted upon a line of cases which were not discussed in *Gilbert* v. *Jarvis*. These are the decisions in which assignees in bankruptcy have been held entitled to the benefit of a trust for the maintenance and support of the bankrupt. Assuming for the present that these cases are authorities where the claimant is only a judgment creditor seeking to enforce the remedies, which are available in Equity by virtue of his execution, it is far from clear that they establish the plaintiff's position. The trust here is

expressed in the following words: "In the first place, to and for the support and maintenance of the said John Edmund Brooke, and his wife Betsy Johnston Brooke, in a fit and suitable manner according to their rank and station, during their joint lives, and during the life of the survivor of them: Secondly, for the support, education, and maintenance of the children of the said John Edmund Brooke and Betsy Johnston Brooke, now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said John Edmund Brooke and Betsy Johnston Brooke."

Power is given to J. E. Brooke and his wife, jointly, during their lives, and to him, if he is the survivor, but not to her if she is the survivor, to sell the land, mortgages, and all other securities, and to take the steps incidental to such sale, and to stand possessed of the proceeds upon the same trusts. Further power is given to them jointly and to the survivor to divide the real and personal estate, or the proceeds thereof, or so much thereof as may then remain unexpended and unappropriated in carrying out the trusts between their said children and their said heirs, if any, in such manner and in such proportion as to them may seem fit, or to exclude any of them entirely from any benefit or portion thereof if they shall see fit so to do, or to convey and make over to any of them by way of advancement any portion of the same to become theirs absolutely.

I agree with Mr. Boyd's argument that as large rights ought to be accorded to the plaintiff, as if the trustees were, not the debtor and his wife, but two wholly independent persons. It appears to me, however, that the intention of the testator was that Brooke and his wife should receive sufficient for their joint maintenance. I cannot bring myself to the conclusion that the language of the will imports the existence of any right in the husband to file a bill against the trustees for payment of a separate annual sum for his maintenance, while he and his wife were living together. The testator did not contemplate anything resem-

bling a divorce or separation of their interests; and if not, the authorities do not, in my opinion, force us to the conclusion that upon bankruptcy any interest in the estate would pass to the assignee.

In *Jarman* on Wills, 3rd ed. at p. 25, it is said: "The vesting in trustees of a discretion as to the mode in which income is to be applied for the benefit of a *cestui que trust*, does not take it out of the operation of bankruptcy or insolvency: to effect which the discretion of the trustees must extend, not merely to the manner of applying the income for the benefit of the *cestui que trust*, but also to the enabling of them to apply it either for his benefit or for some other purpose."

At p. 27, he says: "If the trusts of the property be declared in favour of several, as a man, his wife and children, to be applied for their benefit, at the discretion of the trustees, the man's assignees, in case of his bankruptcy, are entitled to as much of the fund as he would himself have separately been entitled to, after] providing for the maintenance of his wife and children. But if he was entitled to nothing separately, but only to an enjoyment of the property jointly with his wife and children, then his assignees have no claim."

It may be, as was contended, that the cases are not wholly consistent, but so far as I am able to judge, the principle is correctly stated in the passages I have quoted.

In *Godden* v. *Crowhurst*, 10 Sim. 655, the trust was for the maintenance and support of the person who became bankrupt, and any wife and child, or children, he might have, and for the education of such issue, or any of them, as the trustees should, in their discretion, think fit. The Vice-Chancellor held that it did not follow of necessity that anything was to be paid, but that the property was to be applied, and that there might have been a maintenance of the son, and of the wife and of the children, without their receiving any money at all. He said, at p. 656: "For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the

the son and the wife and the children with all that was necessary for maintenance; and, therefore, my opinion is, that I am not at liberty to take this as a mere gift for the benefit of the son simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children. And if that is the true construction of the gift in question, the result is, that the assignees are not entitled to anything." This seems to me to lay down a rule, at once sound in principle and intelligible in statement, and I confess that if decisions can be found, not entirely harmonious with it, but not directly overruling it, I should prefer to follow its authority. In this case the gift would seem upon a reasonable construction to be for the maintenance of the debtor jointly with his wife, and if so, the rule is applicable.

In *Lord* v. *Bunn*, 2 Y. & C. 98, the trustees were to apply the rents and profits of certain freehold and household property towards the maintenance and support of the insolvent and his present, o any future wife, and his children, or any of them, or otherwise for his, her, their, or any of their use and benefit as the trustees should, in their discretion, think proper. It was held that to whatever extent the power might be exercised in his favour, the benefit which he would take by the appointment would vest in the assignee. That decision proceeds upon very simple principles. The trustees, under the power, had a right to appoint in favour of the insolvent and his wife, or in favour of the children, or any of them, with or without the insolvent or his wife, or either of them. With the execution of this power of appointment the Court did not profess to interfere; and, therefore, if the trustees chose to appropriate a part for the exclusive benefit of the insolvent, this necessarily passed to his assignee. This, I think, is all that was decided, and it does not appear to advance the case of the present plaintiff.

In *Kearsley* v. *Woodcock*, 3 Ha. 185, the order followed that made in *Page* v. *Way*, 3 Beav. 20, to which I shall refer presently. The trust was for the support and maintenance of

the bankrupt and of his wife and family, or otherwise for his or their benefit, as the trustees should think proper. The Vice-Chancellor held that it was not of necessity that any part of the trust funds must be applicable for the *separate* benefit of the bankrupt; that the whole property might not be more than sufficient for the support and maintenance of the wife and children, and the benefit which the bankrupt derived might not be capable of severance. The order declared that any interest of the bankrupt under the trusts of the will, not required for the support and maintenance of the wife and children, went to the assignee; and there was a reference to the Master to enquire whether the annual income was more than sufficient for their maintenance. The Vice-Chancellor thus seems to have thought that there were two separate and distinct objects of the testator's bounty, the bankrupt being one, and his wife and family the other. Upon that interpretation of the instrument, the decision is quite consistent with the proposition that the assignee may take no interest where the trust is for the maintenance of the husband and wife jointly.

In *Holmes* v. *Penney*, 3 K. & J. 98, the Vice-Chancellor held that he could not determine how much should be allowed to the wife and children, so as to leave the rest of the income for the creditors of the husband. He held upon the construction of the settlement that an absolute discretion of applying all or any part of the income for their benefit, was given to the trustees. But the language used was certainly very wide. The trust was to pay, apply, &c., the income in and towards the maintenance, clothing, lodging and support of the husband and his present or any future wife and his children, or any of them, or otherwise for their or any of their use and benefit in such manner as the trustees should in their uncontrolled discretion think proper.

But the cases on which the plaintiff most strongly relied are the three to which I am about to refer. The first is, *Rippon* v. *Norton*, 2 Beav. 63, decided by Lord Langdale in 1839, some time earlier than any of the cases already

mentioned. The subject of the settlement was the copyright of certain books and manuscripts, and certain printed copies of books, and the trust in question was to pay and apply, during the life of the insolvent, such part of the profits and produce as he would have been entitled to but for his insolvency, in such manner and to such persons for the board, lodging and subsistence *of himself and his family* as the trustees should think proper. The suit was instituted by the three infant children of the insolvent for the establishment of the deed, the appointment of new trustees, and the ascertainment of the rights of all parties. The insolvent's wife had died before the hearing. The plaintiffs' counsel contended that they and the assignee of their father were entitled to the property in equal fourth shares as tenants in common, and that consequently the assignee was entitled to one fourth of the profits and the three children to the remainder. This was the view adopted by the Court. No reasons are given for making a division, which seems purely arbitrary; nor does the question seem to have been discussed by the counsel for the various defendants. I think that it must have proceeded upon its own special circumstances, and it certainly lays down no rule of general application.

The second case is *Page* v. *Way*, 3 Beav. 20, which was decided by the same Judge in the following year. The question arose upon a marriage settlement, by which the trustees were directed to pay and apply the rents and profits of the settled estate for the maintenance and support of the bankrupt, his wife and children (if any); or otherwise, if they should think proper permit them to be received by the bankrupt during his life. The suit was brought by the assignees who claimed the whole income of the trust estate. The Master of the Rolls thought that the intention was that the wife should be supported out of the property, and he expressed the opinion that so long as the wife and children were maintained by Jones, the trustees had a discretion to give him the whole income, but that it was their duty to see that the wife and children were

maintained. He held that the assignee took everything subject to what was proper to be allowed for the maintenance of the wife and children, and referred it to the Master to settle a proper allowance. Curiously enough notwithstanding this language, the report states that there was no issue of the marriage.

It seems to me to be clear from the expressions of the Master of the Rolls that in his opinion there was what became on bankruptcy equivalent to an absolute settlement upon the husband, subject to a trust for the maintenance of the wife and children, and in that view it was of course that the surplus beyond what was required to satisfy the trust should pass to the assignee.

In *Wallace* v. *Anderson*, 16 Beav. 533, the question arose upon a marriage settlement, by which an estate was conveyed to the trustees upon trust for the husband until he should become bankrupt, and then during the joint lives of him and his wife upon certain trusts, and if he survived his wife upon trust to pay, apply and dispose of the rents and profits in such manner for the maintenance and support, or otherwise for the benefit of the husband and the issue, as the trustees should think proper. The husband survived and became bankrupt, there being one child issue of the marriage. Two years after the bankruptcy the child died, the trustees having in the meantime applied the greater part of the income for his maintenance. The assignees sought from the trustees an account of the rents since the bankruptcy. The death of the child occurred after the claim was instituted. The Master of the Rolls observed that he was not satisfied that the same point had been argued in *Rippon* v. *Norton*, 2 Beav. 63. He directed an enquiry as to what sums had been properly applied by the trustees for the maintenance of the child during his life, and declared the plaintiffs entitled to the balance of the net rents not so applied, and to the whole of the rents from the time of the infant's death. It seems to me that this decision proceeded upon very plain principles. There was no person left to enjoy the benefit of the trust but the

husband, and therefore every thing that remained after its proper fulfilment necessarily belonged to the assignees. Every thing that the bankrupt could have claimed passed to the assignees, and no one remained to make an adverse claim.

Upon a review of these authorities I certainly should hesitate before holding that an assignee in insolvency would be entitled to have an annual sum set apart to satisfy Brooke's creditors. But supposing it to be clear that upon insolvency the assignee could have asserted such a right, it does not follow that an execution creditor stands in the same position. When one considers the consequences of such an assertion, it is apparent that it really involves the administration of the estate of the testator at the suit of a judgment creditor of a beneficiary under the will. Before the Master can properly determine what is annually payable, he must scrutinize all the circumstances connected with the estate, and examine the rights of other parties. While this may be done at the instance of an assignee, upon whom the law confers all the rights and powers of the beneficiary, I understand the Court to have distinctly held in *Gilbert* v. *Jarvis*, 16 Gr. 292, that it cannot be done at the instance of his creditor, who has no privity with the estate.

To measure the extent of an execution creditor's right, we must turn to our statute-law. By the 39th section of ch. 66, R. S. O., it is enacted "that any estate, right, title, or interest in lands, which under the 5th section of the Act respecting the transfer of real property, may be conveyed or assigned by any party, or over which such party has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution, and the Sheriff selling the same, may convey and assign the same to the purchaser in the same manner and with the same effect as the party might himself have done." This comprehensive language undoubtedly empowers the Sheriff to sell almost every, if not every interest which the debtor can have in law within

his bailiwick, but it points to the existence of some recognizable interest in some definite land. Furthermore, if there is some impediment at law, such as the legal estate being vested in trustees, it will be removed by a Court of Equity.

The present Chancellor, in pronouncing judgment in *Robertson* v. *Beamish*, 16 Gr. 676, referred with approval to the definition given by Mr. Adams of the object of an equitable execution, namely, that it is to impose on the equitable interest the liability which would attach at law on a corresponding legal interest. The same learned author observes, p. 130, that a decree will not be made for charging property by way of equitable *fieri facias* or *elegit*, if the property be of a kind exempt from execution at law. The nature and extent of this head of remedial equity were much discussed in the very recent case of *Anglo Italian Bank* v. *Davies*, L. R. 9 Ch. D. 275. The Master of the Rolls stated that when the plaintiff shewed that he was in the position of a man who would have got the land at law, if the estate had been legal, he was entitled to the assistance of the Court of Equity if the estate was equitable. It is worthy of note that the necessity for obtaining equitable execution would seem to be very much diminished by the extension of the sheriff's power to the sale of every interest over which the execution debtor has a disposing power exercisable for his own benefit without the assent of any other person.

Now what estate corresponding to an estate at law has the debtor? None that I can perceive. At most he has a charge upon an income arising out of a mixed fund. The proportion to be charged upon realty is not defined, but is absolutely discretionary. With this discretion the Court cannot interfere; nor does it in my judgment possess the power to make any sum a charge upon the testator's lands, at the instance of an execution creditor of such a beneficiary. Even if it had authority to fix an annual amount as equivalent to the maintenance of the debtor, I cannot see how it can order the trustees to pay a certain

portion of this out of the proceeds of the realty. It is clear that the testator intended the *corpus* of the estate to remain intact for the children, except so far as it may be diminished by advances to them.

I think we must hold that the debtor has no interest which is liable to be attached, and the appeal must be allowed, with costs, and the petition in the Court below dismissed, with costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

PETERKIN v. MACFARLANE ET AL.

Purchase for value without notice—Registration—Right to amend—A.J. Act. sec. 50.

The bill, which was filed against McF., R., McK., and B., alleged that a deed made by the plaintiff and her husband in 1866 to McF., although absolute in form, was made only as security for a loan of $500, from McF. to the plaintiff: that McF. sold to R. and M., who took with notice of the plaintiff's right to redeem: that R. and M. sold the land to B., who took with notice, and that B. gave back a mortgage to secure part of the purchase money, which was still unpaid, and had been assigned to one Watson. The defendant, B., admitted by his answer the alleged character of the conveyance from the plaintiff to McF., and that the sale by McF. to R. and M. was in fraud of the plaintiff; but he denied notice of the plaintiff's claim, and alleged that he was a purchaser for value without notice.

At the hearing, B., who was the only appellant, made an application for leave to file a supplemental answer, setting up the facts shewn by the evidence, that his deed from R. and M., and their deed from McF., as well as his deed from the plaintiff, had been duly registered, which was refused.

A decree was made declaring that the conveyance to McF. was only as security for the repayment of the $500: that R. and M. bought with actual notice of the plaintiff's claim, and that B. bought from them with actual notice.

It did not appear whether the decision was on the ground that B. had actual notice when he purchased, or that B., not having paid his purchase money, was unable to plead purchase for value without notice.

Held, (PROUDFOOT, V.C., dissenting,) that the evidence did not shew that B. had actual notice of the plaintiff's claim when he purchased: that the amendment should have been allowed, and that this Court had power now to allow it under the A. J. Act, sec. 50; but as it would not be proper to conclude the plaintiff without an opportunity of producing further evidence, the case was sent down for another hearing.

Per PATTERSON, J.A.—The provisions as to amendments in R. S. O. ch. 49, sec. 8, and in R. S. O. ch. 50, sec. 270, are *in pari materia*, and the suitor's rights to claim an amendment are the same whether at law or in equity.

Per PROUDFOOT, V.C.—That the permission to amend was in the discretion of the Judge, and that the Court should not interfere with his decision.

Observations as to the policy of the former rule (now abolished by R. S. O. ch. 59, sec. 9,) that a purchaser who had not paid all his purchase money could not avail himself of the defence of purchase for value without notice.

THIS was an appeal by the defendants Burke from a decree of Spragge, C., declaring that the plaintiff was entitled to redeem certain lamd conveyed by her and her husband to the defendant MacFarlane by a deed absolute in form, but which the bill alleged was only as security for the repayment of $500, lent by MacFarlane to the plaintiff,

and that he had sold the land to Rose & McKenzie, who took with notice of the plaintiff's right to redeem, and that they sold to the defendant Burke, who also took with notice. The other facts are stated in the judgments below.

The learned Chancellor refused leave to amend in order that the defendant who appeals might plead the Registry Act.

The case was argued on the 10th September, 1878 (a).

C. Moss, for the appellants. The evidence shews that the defendants Rose & McKenzie were *bonâ fide* purchasers for value of the lands in question without notice of the alleged claim of the plaintiff, and the appellant as an innocent purchaser for value of the said lands from them, without notice of the alleged claim, is entitled to the protection afforded to such purchasers. The onus of proving notice was clearly upon the plaintiff; but there was no evidence proving such notice to the defendants Rose & McKenzie prior to their obtaining and registering the conveyance of the lands from James MacFarlane to them; nor was there any evidence proving notice to the appellant prior to his obtaining and registering the conveyance of the lands from the defendants Rose & McKenzie to him, or at any rate no evidence sufficient in law to charge them with notice. The appellant is entitled to rely upon the Registry Laws, and the learned Judge who tried the cause should have allowed the appellant to plead and set up the Registry Laws in his defence. The plaintiff's laches, delay, and acquiescence, ought to disentitle her to any relief. [Arguments on other points are omitted, as the judgment proceeds on the right to amend.] Moreover, the appellant ought to have been allowed for his improvements to the extent to which the same enhanced the value of the lands, and his claim for such allowance ought not to have been restricted

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as in the said order. He cited *Powell* v. *Lea*, 20 Gr. 621; *Proctor* v. *Gravely*, 9 Gr. 26; *Boulton* v. *Robinson*, 4 Gr. 109; *Natal Land Co.* v. *Good*, L. R. 2 P. C. 121; *Gilleland* v. *Wadsworth*, 1 App. R. 93; R. S. O. ch. 95, sec. 44.

Boyd, Q. C. (with him *C. R. Atkinson*), for the respondents. The learned Chancellor who tried the case and had the advantage of seeing the witnesses, found that the defendants, Rose, McKenzie, and Burke, respectively, purchased the lands with notice of the plaintiff's claim, and were not innocent purchasers for value without notice, and this finding is clearly supported by the facts. The appellant was not entitled to avail himself of the defence of the Registry Law, as it was not pleaded; and the discretion of the learned Judge in refusing to allow the amendment cannot be interfered with, as it is not appealable: *McManus* v. *McManus*, 24 Gr. 118: *Guggisburg* v. *Waterloo Mutual Fire Ins. Co.*, 24 Gr. 355. If, however, the amendment had been granted the defence could not have been sustained, as it is abundantly established that even if he had not notice when he purchased the land, he acquired it before paying all the purchase money: *Henderson* v. *Graves*, 2 E. & A. 9; *Hudson* v. *Warren*, 1 Ha. 57; 2 W. & T. L. C. 5th ed. 49. No such delay, laches, or acquiescence is established against the respondent as to disentitle her to relief.

The appellant should not have been allowed for his alleged improvements: *Constable* v. *Guest*, 6 Gr. 510; *Panel* v. *Johnson*, 12 Gr. 479; *Moore* v. *Painter*, 6 Jur. 903; *Fuller* v. *Benett*, 2 Ha. 394; *Spence's* Eq. Jur. 808.

March 10th, 1878. BURTON, J. A. (a)—As, after a very anxious and careful consideration of this case, I have come to the conclusion that the amendment asked for at the hearing, setting up the defence of the Registry laws, should have been allowed, and the plaintiff should be entitled if

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so advised, to meet that defence by further evidence, I do not propose to enter into any critical examination of the evidence that was adduced at the hearing or in the Master's office, except in its bearing upon the question of amendment, especially as my brother Patterson has, in the judgment he is about to give, reviewed it very fully.

Upon a perusal of the evidence, one cannot but feel that the defendants have not adopted a very prudent course in making the admissions they have made in their answers, and in placing their defence simply on the ground of want of notice.

I cannot, however, although I speak with great diffidence upon a question of equity pleading, bring myself to the same conclusion as my brother Proudfoot in the judgment he has kindly permitted me to peruse, as to the effect of these admissions. The charges that by the act alleged, MacFarlane intended to cheat and defraud the plaintiff, are rather deductions which the pleader has chosen to draw from the facts, than allegations of fact, and no unfavourable inference should be drawn from the admission against the defendants. All that the admissions amount to is, these allegations may or may not be true; we know nothing of their truth or falsity, and we do not, so far as the facts are concerned, propose to take any issue upon them, but we say we had no notice of them, and should not be affected by them. This is the only issue tendered, and, it is unnecessary to add, the onus of sustaining that issue was upon the plaintiff.

The material fact admitted by the defendants, and without which admission the plaintiff I apprehend must have failed, is, that the deed to MacFarlane, though absolute in form, was made in security for $500 lent. Although the defendants have made a concession without which the plaintiff would probably have been out of Court, it was still incumbent upon her to shew that the defendants were aware of the character of the conveyance and of the plaintiff's claim as alleged in the bill.

Nor do I think the admission of James Peterkin's agency

should be extended beyond the precise allegation made in the bill, viz., that in the one particular transaction of obtaining the money he acted as the plaintiff's agent. The defendants do not admit that they had any knowledge of this; and much of the evidence points to a very different right to that alleged, a right referred to by James MacFarlane as having been granted to James Peterkin to repurchase or redeem within two years, notice of which would be no notice of the claim now asserted on the part of the plaintiff.

It is in this view that it becomes material to bear in mind that in 1865 the land belonged to James Peterkin, who, being in pecuniary difficulties, made a transfer to the plaintiff, his sister-in law, for an alleged consideration, as he says, of *about* $300, the land being, according to the evidence of both, of much greater value.

The deed to MacFarlane was made about a year later on the 31st of August, 1866.

His account of the negotiations leading to that conveyance is, that the plaintiff sent him to Thompson, a son-in-law of MacFarlane, to get him to advance money on mortgage of the property. She did not say how much he was to borrow, fix the period of the loan, or the rate of interest. Nor was any rate of interest mentioned by him to Thompson.

It was, as he says, during this negotiation that MacFarlane came forward and said, not that he would advance $500 on the land, but would give $500 for the land and his lifetime to redeem. No rate of interest was mentioned. No mortgage suggested, but as the witness himself describes the transaction, *McFarlane was to buy* 100 *acres of land for* $500.

This is the transaction as stated by James Peterkin.

Rose, who, it is admitted, had no notice at the time he purchased, speaks of a conversation subsequently with MacFarlane, who referred to it *as a purchase from James Peterkin, with a right of re-purchase within two years*, on repayment of the purchase money and interest.

McKenzie also denies notice, and I fail to discover any

contradiction in his evidence when he states that he had *no notice of the plaintiff's claim* until served with the bill. What he admits he had notice of, was some arrangement MacFarlane made with James, which he says he heard from McFarlane a month or more after he got his deed.

He states, also, that when remonstrated with by James and Alexander Peterkin about cutting the stakes, he appealed to James as to whether he had not given him permission to cut them, which he admitted, but stated that the land *now belonged to MacFarlane,* and Alexander Peterkin threatened to report him to McFarlane. The ash tree, he says, was cut some nine months previously, and supposing it to have been cut during the time the title was in Mrs. Peterkin, he went to settle with her for it.

I think, therefore, that there is no discrepancy in the depositions and evidence of McKenzie ; but it is undoubtedly stated by James and Alexander Peterkin that when they acting as they say, for MacFarlane, remonstrated with McKenzie for cutting the stakes, they were studious to mention that MacFarlane had given his lifetime to redeem it, allthough that was a matter in which McKenzie could not be supposed to have any interest. James does not say that he mentioned Mrs. Peterkin as the party having the right to redeem, but Alexander does.

Mrs. Peterkin's account of the conversation with McKenzie is rather remarkable. According to the evidence of her witnesses, he had been made aware that the property had been conveyed by her to MacFarlane, and that there was a right to redeem. And yet she says he came to her to see if she was the owner, and shortly afterwards contradicts herself by saying that he did not, to her knowledge, ask her what title she had to the property, but accompanies it by a further statement, that the land was in MacFarlane's hands, and that the timber was to remain on the land until it was redeemed—a point upon which she is contradicted by her own witness.

The evidence of the other witnesses called by the plaintiff, is quite consistent with the theory of the defence.

Owens says MacFarlane told him he had bought the land from James Peterkin and had promised to allow him to buy it back again. Urquhart speaks of the arrangement being to give it back to James Peterkin.

Mr. Walker, the clergyman, narrates an interview with the plaintiff, in which she wished him to subject MacFarlane to church discipline; but the injury she complained of was not to herself, but to a relative.

As to the notice to Burke, it is quite clear he had express notice after his purchase and before full payment of his purchase money, unless the transfer of the mortgage to Watson was equivalent to payment, but how is the evidence of notice before his purchase ?

It appears from James Peterkin's evidence that he had heard that MacFarlane was going to sell to some one. He then tried himself to get a purchaser, and went to see MacFarlane, and after that interview went to Burke and obtained an offer from him of $550 for half of the land, and subsequently $1,100 for the whole, but MacFarlane then declined to sell, giving no particular reason. He and the plaintiff went a second time to MacFarlane, as he expresses it, to see "if he would not let us have the place." He says that Burke wished him to go back and reason the thing with MacFarlane, but he told him he did not think it would be of any use, as he had done the best he could. He says he told Burke that $500 was the amount required to redeem it, and yet we are asked to believe that although Burke was prepared to pay $1,100 for the lot, they quietly acquiesced in this, although it is now claimed that he had at the time the right to redeem. It is only conceivable on the assumption that James had been given a right to repurchase within a period which had expired, or had no right at all.

Mrs. Peterkin says that a week before the sale to Rose & McKenzie, she called upon MacFarlane to see if he would return the land, and he then said he had an offer of $1,000 from McKenzie, but would not sell and would tell him it was to be redeemed. She and James were then endeavouring

to induce Burke to purchase and to induce MacFarlane to accept the amount advanced or the amount and interest.

There is nothing in their evidence to show that they then asserted a right to redeem. On the contrary, as I read it, they seem to have acquiesced, and Burke appears to have been satisfied as to MacFarlane's right, and to have evinced a desire to purchase, but was unwilling to do so without the approval of the plaintiff or James Peterkin and desirous that they should receive the excess of purchase money over the $500, which may well account for his saying that he would like to purchase, but was afraid he would have no luck with it, and expressing the opinion that no other man than MacKenzie would be mean enough to have purchased. It is at all events most improbable that at a time when the plaintiff and James Peterkin were anxious that Burke should purchase, they should have given him notice of an adverse claim.

It is giving to Burke credit for a very small amount of intelligence that he should, with the knowledge that the plaintiff had a right to redeem on payment of $500 and interest, have purchased this property subsequently for $1,500.

I quite agree that if the right of the plaintiff to redeem is established or admitted, and the defendant had notice, she will not be barred by any delay short of the period fixed by the Statute; but the fact that she was aware that Rose & McKenzie were in possession, and cutting and removing the timber without remonstrance on her part, is a strong circumstance to show that no such right as is now asserted was then claimed, and therefore that the defendant Burke could not have had notice of it when he purchased.

If it had been clear that the learned Chancellor had come to the conclusion that there was sufficient evidence of notice before Burke made his purchase, we should very properly hesitate to interfere with his decision, even though a perusal of the evidence might impress us differently. Upon that point I concur fully in the remarks which have

been so frequently made as to the duty of an Appellate Court in dealing with questions of fact which have been adjudicated upon by the Judge of first instance. But the learned Judge has not informed us of the reasons for his decision, and it may be that he decided purely on the notice which Burke has since received, that is to say, since he accepted the deed and paid a portion of the purchase money, but before it was fully paid up, and hence it is that I think the amendment should have been made.

If in point of fact he had notice before the contract, the registry laws will afford no defence. If, on the other hand, he purchased in good faith, and accepted a conveyance and paid part of his purchase money, but before he had paid the whole received notice, then I can conceive of nothing more inequitable and unjust than to deprive him of the fruits of his purchase and leave him possibly without any remedy, and I am happy to find that the Legislature has provided in the future against the recurrence of such an injustice. But there is an additional reason why, in the present case, the defendant should not have suffered from a slip of his solicitor. If there is any foundation whatever for the plaintiff's claim, it was her duty at once, on discovering that Rose & McKenzie were in possession and removing the timber, to have filed her bill and prevented the possibility of wrong to an innocent purchaser. Burke might very reasonably have inferred that if any claim ever existed it had been waived.

It is said that the amendment is a matter entirely for the discretion of the Judge. I do not propose to discuss whether sec. 50 of the Administration of Justice Act should receive the same construction as the 222nd sec. of the C. L. P. Act, but the 11th sec. of the Act of 1874 gives to this Court all the powers and imposes upon it all the duties as to amendment, which were held or imposed upon the Judge from whom the appeal is had.

Courts of Common Law constantly review Nisi Prius decisions, and grant new trials where an amendment has

been improperly refused, and do whatever is necessary to ensure substantial justice.

Here, however, we are not only expressly empowered, but required to make the amendment, if we are of opinion that it is necessary for the advancement of justice, the determining the real question in controversy, and securing the giving of judgment according to the very right and justice of the case.

I cannot for a moment doubt the justice of giving to this appellant the benefit of the defence of the Registry laws. If it be established on another hearing that he had notice before he made the purchase, this will not assist him. On the other hand, if he made the purchase in good faith, the plaintiff, and not he, should be the sufferer.

In the case of *Tildersley* v. *Harper*, Weekly Notes, 23rd Nov., p. 210, Mr. Justice Fry refused an amendment when the pleading was not in accordance with one of the orders under the rules of Court of 1875, and so in effect amounted to an admission. The suit was to set aside a lease on the ground that the trustee who granted it had done so at a lower rent than could have been obtained, in consideration of a bribe of £500. The denial was in the words of the charge putting, or purporting to put in issue the whole string of circumstances alleged in the claim, and it was contended therefore that there was no fair and substantial answer to the allegation of substance, viz., that there was a bribe; but on appeal, the Court, consisting of Baggallay, Bramwell, and Thesiger, L. JJ., were of opinion that there had been a *bonâ fide* mistake in the pleading, and that the Judge ought to have given leave to the defendant to amend his statement of defence and so ordered.

I think the same reason applies here, and that no possible injustice can result from allowing the amendment; if the notice can be brought home to Burke before his purchase, the plaintiff must still succeed, whereas, as I have already remarked, if he purchased without notice, very great injustice would be done in depriving him of the benefit of his purchase, because he received notice before all the

purchase money was paid, although he is still powerless to resist payment of the balance, the mortgage given for it having been assigned to an innocent purchaser.

Courts have frequently expressed the opinion that the doctrine of notice should be restricted rather than extended, and all recent legislation has been in favour of extinguishing claims of this nature, when the parties have not taken the precaution of reducing them to writing, and placing them on record.

To adopt the language of the judgment in *Barnhart* v. *Greenshields*, it would be inconsistent with the security of property, and with every rule and principle of equity, to affect the conscience of a purchaser in such cases except upon evidence of the most conclusive character.

I think the amendment should have been allowed, and as it impossible to say how the learned Chancellor would have regarded the evidence of notice if confined to such as was offered to bring it home to Burke before he took his conveyance, it will be necessary to send the case down to a new trial.

The defendant has brought much of the difficulty upon himself by his loose pleading, and I think there should be no costs of the appeal to either party. I have felt more difficulty as to dealing with the costs below, but as the fault, in the view we take of the matter, was that of the Court and not of the plaintiff, I think the costs of the former hearing and proceedings upon it, should abide the event and be part of the plaintiff's costs in the event of her ultimately succeeding.

PATTERSON, J. A.—The bill was filed against James MacFarlane, Colin H. Rose, Duncan McKenzie, and Thomas Burke. MacFarlane died, and John P. Alma, his administrator, is, now a defendant. The charge is, that a deed of land made by the plaintiff and her husband in 1866 to James MacFarlane, although absolute in form, was made only as security for the repayment of $500 lent by MacFarlane to the plaintiff; that MacFarlane sold to the

defendants Rose & McKenzie, who took with notice of the plaintiff's right to redeem; that Rose & McKenzie, after cutting timber from the lot, sold the land to the defendant Burke, who also took with notice; and that Burke mortgaged the land to Rose & McKenzie, to secure $1,050 and interest, and they have assigned the mortgage to one Watson.

The plaintiff asks to be let in to redeem, and for other relief, and amongst other things that the defendants may be compelled to pay off and remove the mortgage.

The defendant Burke, who is the only appellant, admits by his answer those paragraphs of the bill which set out the alleged character of the conveyance from the plaintiff to MacFarlane, and that MacFarlane's sale to Rose & McKenzie was in fraud of the plaintiff; but he says he is not aware that the plaintiff claimed any interest in the land after the conveyance to MacFarlane. He denies notice of the plaintiff's claim, and alleges that he is a purchaser for value.

It is shown that Rose & McKenzie bought from MacFarlane for $1,200, which they paid, and that Burke bought from Rose & McKenzie for $1,550, for part of which he gave the mortgage which has been assigned to Watson and is not paid up.

The date of the conveyance to Rose & McKenzie was 13th June, 1871; that of their conveyance to Burke 29th June, 1872, which was also the date of his mortgage back; and the assignment to Watson was made on the 12th of July, 1872.

The case was heard on 4th May, 1875, before the Chancellor, who gave judgment on 18th October, 1876, in favour of the plaintiff.

The decree declares that the conveyance to MacFarlane was only as a security for the repayment of $500 advanced by him to the plaintiff on 31st August, 1866, with interest at six per cent.; that Rose & McKenzie bought with actual notice of the plaintiff's claim, and that Burke bought from them with actual notice.

We have no report of the judgment delivered by the learned Chancellor, nor any information as to the views taken by him of the evidence, or of the opinion he may have formed of the witnesses examined before him.

At the hearing, an application was made on the part of Burke for leave to file a supplemental answer, in order to set up the facts shown by the evidence that his deed from Rose & McKenzie, and their deed from MacFarlane, as well as MacFarlane's deed from the plaintiff, had been duly and promptly registered.

This application was refused.

Its object was to meet the objection to his claim of the status of a purchaser for value founded on the non-payment of that part of his purchase money which remained upon the mortgage held by Watson, as he was clearly a purchaser for valuable consideration within the meaning of those words as used in the Registry law.

It was only in this way that the Registry law would help him, and it is not denied that it would throw upon the plaintiff the onus of shewing actual notice to him at the time of his purchase on the 29th June, 1872.

If such notice were found as a fact, the amendment asked for would obviously be useless. Its refusal would not have been a ground for reasonable complaint, and it ought not to be granted now.

But as we are unfortunately without information as to the precise grounds on which the decision proceeded; it is impossible to say whether the finding was on the ground that the actual notice existed on the 29th June, or that Burke, not having paid his purchase money, was affected by notice though not received until the inception of this litigation.

The formal declaration in the decree that Burke purchased with notice does not settle this point; and it can afford no clue to the reason for the refusal of the amendment, as that was at the hearing a year and a half before the judgment was pronounced.

When the evidence is looked at, it certainly seems very

insufficient to support the assertion that Burke had notice or knowledge of the plaintiff's claim when he bought in June, 1872. It all relates to an occasion before the purchase by Rose & McKenzie, when some communications took place between Burke and James Peterkin, who appears all through as the beneficial plaintiff, with the object of Burke becoming the purchaser of half the land from MacFarlane in order that Peterkin might get the other half. Burke says the proposal came from Peterkin, and Peterkin scarcely says it did not, though he relates the incident as if Burke was the mover. Burke did not see MacFarlane about it. The negociation with MacFarlane was conducted entirely by Peterkin and ended in MacFarlane, who had for a while entertained the proposal, refusing to sell; and there the matter dropped. While Burke was bargaining with Peterkin, he is said to have gone to the plaintiff to ask her if MacFarlane was likely to agree to what they wanted, and she says she then told him of her right to redeem the land. Burke denies this. But without the aid of his version of the affair, it seems plain that the Peterkins acquiesced in MacFarlane's assumption of absolute ownership, or that their submission at the time would naturally lead Burke to infer that they did so acquiesce.

The only persons who give evidence on this point are the two Peterkins and Burke himself. I extract this part of the evidence.

The plaintiff said: "I talked with Thomas Burke about the land. That was after the conversation with McKenzie and the spring before MacFarlane sold it. He came to the house to see if MacFarlane had agreed to sell half of the land, so that the other half could be redeemed. Burke was going to buy half if we could arrange about the other half. I told him MacFarlane would not sell half to redeem the other. Burke asked me if MacFarlane had got a clear deed of the place, and I said he had got a clear deed, giving MacFarlane's lifetime to redeem it, or as soon as the money was made up. Burke said he thought that if MacFarlane had a clear deed that he could give a clear deed. I told

him he could give him a clear deed, but not a good title. Burke said that if James Peterkin took some one to MacFarlane that he would be a strange uncle if he would not do right."

I may remark here in passing the apparent inconsistency of this warning with the subject of the plaintiff's conference with Burke. His errand to her was to find out if MacFarlane could not be persuaded to sell to him. Her anxiety was, that MacFarlane should sell to him. Her perplexity was, because MacFarlane would not sell. Yet she says that in this discussion she warned Burke that MacFarlane could not give a good title. Further on she says: "Burke began by asking whether MacFarlane was agreeable that half of the land should be sold, so that the other half could be released. I told him that he was not agreeable to sell. I heard this from James Peterkin. He said he would like to buy the land, but that he was afraid he would have no luck with it if he did."

James Peterkin's story reads thus: "I had a conversation with MacFarlane about the land before his death, as it was reported that he was going to sell the place. Mrs. Peterkin sent me to ask him whether the half might not be sold so that the other half might be redeemed. I went to him and spoke to him, and he seemed to be agreeable, all he wanted he said was his money. This was about three or four years after the deed had been made to him. I heard of some one who wanted to buy, one Urquhart; and he came to see the place, and he said fifty acres was too little, that he wanted 100 acres. I next saw MacFarlane. I went to see one Burke, who wanted to buy. He made an offer of $550 for the fifty acres of the land. I then went to see MacFarlane, and then he would not agree to selling it at all. He gave no particular reason. I remember seeing MacFarlane again in company with plaintiff (my sister-in-law) to see if he would not let us have the place. We saw him. She wanted him to give her some time to redeem the place, but he said he wanted the money right down, or he would not let her have it at all. Burke and I had some talk as to the way

the property stood. I told Burke that the property was Mrs. Peterkin's, and that I was doing the business for her. Burke wanted me to go to MacFarlane and reason the thing with him. But I told Burke that I didn't think it was of any use, as I had done the best I could. I explained to Burke that MacFarlane had got a deed for the land, but that he had given Mrs. Peterkin his lifetime to redeem it. I told Burke how much money MacFarlane had advanced, and that $500 was the amount required to redeem it. This was before MacFarlane had sold to McKenzie. I never had more conversation with Burke until it was sold." And Burke tells his tale in these words:—

Thomas Burke: "I bought the land from Rose & McKenzie; I was living in Dover East; I was living near this property at that time. I was to pay $1,550 (deed to Burke produced, marked "C.") I acknowledge this deed to be the deed from Rose & McKenzie to me. I paid $550 down, and gave a mortgage for balance, and have since been making payments to Watson; I made two payments since that. When I bought the place I did not know that Mrs. Peterkin had any claim to the land. Mrs. Peterkin never told me of any claim of any kind; she told me that James sold the land to MacFarlane on account of some trouble he was in. James Peterkin wanted me to buy part of the land from MacFarlane, so that he could get the other half. He did not tell me of any claim that he had. He said that MacFarlane owned the land. James did not tell me how he thought he could get the other half. Mrs. Peterkin did not tell me that Peterkin had two years to redeem the land in nor anything of the kind, as mentioned in her evidence. I never said that there was not a man in the township who would be mean enough to buy the land except McKenzie, or anything of the kind. I do not remember when I had the talk with Peterkin; it was in March, 1871, I think; I had the talk with Mrs. Peterkin a little while after. I do not remember any conversation in particular with Mrs. Peterkin. Peterkin wanted me to buy half the land,

so that he could get the other half. I did not go to see MacFarlane. I don't remember Peterkin saying anything to me more in particular; he told me that MacFarlane owned the land. I cannot tell any reason for my speaking to Mrs. Peterkin. I went to see James and spoke to Mrs. Peterkin. I believe that James Peterkin told me that MacFarlane was not agreeable to sell. I do not remember that Mrs. Peterkin told me that McFarlane was agreeable to sell. I do not remember Mrs. Peterkin telling me the terms on which the land was sold. I am prepared to deny what James Peterkin and Mrs. Peterkin said about me in the box. She did not tell me the terms on which the land was bought."

If we take along with this the plaintiff's own statement in another part of her evidence, that from the time when Rose & McKenzie bought the land, although they cut timber extensively upon it, and although the plaintiff lived on the other half of the same lot, she never by word or deed interfered with them, even to the extent of forbidding them to cut—which is evidence of acquiescence of the strongest character; and if we give any weight—and I think some weight is due—to the circumstances that Rose & McKenzie paid $1,200 for the land, which Burke undoubtedly knew, and that he himself paid or bound himself to pay $1,550 for it, we have a state of facts from which, even assuming that the conversations with Burke occurred just as the plaintiff states, it would be a matter of extreme difficulty, if not quite impossible, to believe that Burke made his purchase with the knowledge, or with any reasonable grounds for supposing that the plaintiff still asserted any claim.

I should myself hesitate long before according full credence to the plaintiff's story of what she told Burke There are plenty of reasons for caution besides the improbability of the thing having happened in the way she relates, and leaving out of account Burke's denial.

But even if she did tell him she had a claim, it by no means follows that we should impute to him notice of any

existing claim a year later, when the plaintiff had, by her acquiescence in MacFarlane's assertion of dominion in the very transaction in which Burke was interested, and by her subsequent acquiescence—or apparent acquiescence, for Burke could only judge from appearances—in the ownership of Rose & McKenzie, proclaimed to him that no such claim existed. He would seem fairly entitled to be judged by the criterion applied in the case of *Raphael* v. *Bank of England*, 17 C. B. 161, in which a banker was held entitled to recover, as a *bona fide* holder, the amount of a bank note cashed by him, notwithstanding that he had, some time before he took the note, received a printed notice that it had been stolen, because at the time it was not present to his mind.

The onus was upon the plaintiff to shew notice to Burke. If she failed, as I do not doubt she ought, upon this evidence, to fail, to establish actual notice when he bought, she would evidently find the effect of the Registry law a serious obstacle in her way.

I do not say that Burke should not succeed without the aid of the Registry law. I do not discuss the question whether even under the doctrine which prevailed at the time of these transactions, though since that date altered by statute, he was not under the facts a purchaser for value. This mortgage appears to have been assigned to Watson a few days after it was made; and the effect of this may have been the same as if he had borrowed the money from Watson and paid it to Rose & McKenzie. But no point has been made upon this either in the evidence or in argument, and I therefore assume that the aid of the Registry law is essential.

I think the appellant should have leave to set up the Registry law as a defence. I am unable to see that justice requires that indulgence to be withheld from him. On the contrary, I take it that the real question in controversy between the parties is, whether, in view of all the facts affecting the title to this land, the appellant is entitled to hold it free from the equity asserted by the plaintiff. One

fact which is beyond contradiction is, that the appellant has a registered title. He is, upon this fact appearing, in a position to contend that he has rights under the operation of the Registry law; and it does not seem to be an unreasonable complaint that, if the consideration of these asserted rights is excluded, it can scarcely be affirmed that judgment has been given according to the very right and justice of the case.

The application to amend his pleadings was made under section 50 of the Administration of Justice Act of 1873, which is now included in sec. 8 of the Revs. Stats. cap. 49. That section contained the enactment that "at any time during the progress of any action, suit, or other proceeding at law, or in equity, the Court or Judge may, upon the application of any of the parties, (and whether the necessity for the required amendment shall or shall not be occasioned by the defect, error, act, default or neglect of the party applying to amend,) or without any such application, make all such amendments as may seem necessary for advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case; * * all such amendments shall be made upon such terms as to payment of costs and otherwise, as to the Court or Judge ordering the same to be made seem just."

The power to make the amendment is thus ample, but it is contended that it is left to the discretion of the Court or Judge to exercise it or not. It is pointed out to us that the provision of sec. 222 of the Common Law Procedure Act, which is now found in sec. 270 of the R. S. O. c. 50, and which makes it compulsory in Common Law Courts to make all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, is not contained in this 50th section. From this it is argued that the Legislature has been more careful of the interests of suitors

before the Courts of Common Law than before the Courts of Equity, by denying to the former the discretion which is claimed as still belonging to the latter. I do not think it necessary to enter into a close discussion of the exact scope or the probable policy of these differing enactments; but it may not be out of place to express my own opinion that the idea that a different rule is intended to be laid down for procedure in one jurisdiction from that which is to obtain in the other, while opposed to the spirit of our recent legislation, is founded upon a misconception of the Statutes. I think the intention is, that justice shall be meted with the same measure, whether the accident of the technical character of the right in question, or the whim of the plaintiff's solicitor, causes the contest to take place at law or in equity. I think it is manifest that the Legislature intended that no man's right should fail, and that no suitor should be denied a hearing merely because, by some slip or oversight, or by reason of imperfect instructions or defective skill or judgment, his claims had not been formally or fully placed upon the record, if the error could be cured by amendment and the opposing litigant protected by the imposition of terms; and, having regard to the numerous cases in which, at Common Law, by reason of some variance or formal defect of statement or of proof, plaintiffs were nonsuited or proceedings rendered abortive, occasioning delay and expense even when the rights in litigation were not concluded by the technical result, it is not hard to find a reason for the declaration that all such amendments as were authorized should, when necessary for determining the real question in controversy, be made so as to determine it *in the existing suit*, without taking this provision of the C. L. P. Act to indicate that a suitor's rights are not the same on whichever side of Osgoode Hall he happens to be.

But after all, I doubt if there is any real difference of opinion. No one will go so far as to assert that a final judgment should be contrary to the very right and justice of the case; and no Court possessing the powers given by

section 50, and having before it the facts on which, to its apprehension, the right and justice of the case depend, would hesitate in exercising those powers in the spirit in which that section is conceived. To do otherwise would be to avow that a decision by which a party was finally bound was given, not according to the right and justice of the case, but according to what may have been an error or a slip. And when we say that the amendment is left to the discretion of the Judge, we are in a truth saying no more than that to him belongs the decision of what is the very right and justice. He has to say wherein this lies; he may have, in determining it, to balance opposing considerations; but when he has made up his mind that the amendment asked for is or is not "necessary for the advancement of justice, the prevention or redress of fraud, the determining of the rights and interests of the respective parties, and of the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case," the granting or refusing of it practically ceases to be a matter of discretion. It follows as the necessary result of his conclusion upon the question of fact or mixed question of fact and law which has been presented. This is the same at Common Law as in Equity, with the added mandate that, at law, when once the Judge has decided that the amendment is necessary for determining the real question in controversy, he must make it in the existing suit—a mandate which the character of equity procedure may perhaps have rendered it unnecessary to extend to that jurisdiction; but which, when a more liberal system was being introduced at law by the Common Law Procedure Act, may have been useful in emphasizing the relaxation of the ancient rigidity, and securing the intention in that direction from being defeated by the *vis inertia* which every innovation in legal procedure has to encounter.

In my opinion, the power to review a decision upon questions of law or of fact extends to the refusal to grant an amendment. The necessity for the amendment for the

purposes enumerated in sec. 50 may be a question of fact or of law, or of both; and whichever it may be, it is the subject of appeal.

But our jurisdiction in the matter of amendments is not only appellate.

The effect of sec. 50, as I understand it, and the intention manifest from its provisions, may, I think, be correctly expressed in this form: The rights and interests of the respective parties, and the real question in controversy between them, shall be determined, and judgment shall be given according to the very right and justice of the case; and any amendment necessary for these purposes may be made at any time during the progress of the suit, and shall be made on such terms as may seem just.

We have all the powers and duties as to amendment and otherwise of the Court or Judge from which or to whom the appeal is had. We are very much in the position of one of the Common Law Courts reviewing *in banc* the decision of a Judge at Nisi Prius. In such a case, as remarked by Pollock, C. B., in *Brennan* v. *Howard*, 1 H. & N. 138, 140, "if it should appear on the trial of a cause that the defendant had a perfectly good defence to the action, but the pleadings did not raise the question, and the Judge refused to amend, the Court would grant a new trial." In the same case it was pointed out that by granting a new trial the Court might be sending the parties down to try a question which was not in dispute, and that a better remedy would be found by procuring the Court, by a substantive application, to make the amendment. The case itself was one in which an amendment had been refused, and the Court declined to interfere.

I have avoided any discussion of the evidence touching notice to Rose & McKenzie, and I shall merely say as to it that it must have impressed the learned Chancellor who heard it differently from the way in which the reading of it impresses me, as he found it so far to preponderate in favour of the plaintiff, on whom the affirmative of the issue rested, as to lead to a finding in her favor. I have dis-

cussed that relating to the notice to Burke in order to explain why I think the plaintiff, on whom the onus of this issue also lay, has failed to establish the notice, making it probable that, if my view of this evidence is correct, the appellant would have succeeded in maintaining his title under the Registry law, and making it therefore proper to allow him to set up that defence.

But it would not be proper to conclude the plaintiff without an opportunity of adducing any further evidence she may have.

I therefore think we should vacate the decree, and send the case to another hearing.

As to the terms upon which this should be done. The judgment appealed from was pronounced on 26th October, 1876, but in consequence of a motion to vary the minutes and some interlocutory proceedings upon which judgment was not given until January, 1878, the decree was not entered until February, 1878. There are some costs of these proceedings, as well as the costs of the hearing and of this appeal to be disposed of.

I think there should be no costs of this appeal to either party, and as we give the appellant relief which became necessary from no fault of the plaintiff, I think the costs of the hearing and of the subsequent proceedings up to the entry of the decree, should abide the event.

PROUDFOOT, V. C.—The case made by the bill is, that the plaintiff was the owner of the land in question, and being in want of money, applied by her agent James Peterkin to MacFarlane to advance her $500, and that to secure the repayment of it the plaintiff and her husband would convey the land to MacFarlane: that on the 31st of August, 1866, MacFarlane paid $500 to the plaintiff, and the plaintiff and her husband on that day conveyed the land to MacFarlane in fee simple: that this conveyance, though absolute in form, was expressly understood between the plaintiff and MacFarlane to be only a security for the repayment of the money, and that upon such repayment

MacFarlane should reconvey the land to the plaintiff free from incumbrances: that prior to the 13th June, 1871, the plaintiff had arranged a sale of half the land in order to redeem the whole, and proposed to MacFarlane to do so, or to borrow the money if he required it on the land and redeem him, but he refused to allow the plaintiff either to sell half of it or to mortgage it, but told her that when she got the money otherwise he would reconvey: that subsequently the plaintiff offered to pay MacFarlane the $500 and interest and costs, which he refused to receive and pretended he was not bound to treat the conveyance as a security, and as it was absolute in form, he was not bound to re-convey on payment of the money and interest: that for some time prior to the 13th June, 1871, the timber on the land became of great value, and MacFarlane, in pursuance of his threat to treat the conveyance as absolute, and thereby to cheat and defraud, he absolutely sold and conveyed the land to Rose & McKenzie, partners, in obtaining, manufacturing and selling timber, saw-logs, cordwood, and staves, by indenture bearing date 13th June, 1871, for the consideration of $1,200: that before the sale to Rose & McKenzie, they had full knowledge and actual notice of the plaintiff's claim to the land, and of her right to redeem it; that on the 21st of June, 1872, Rose & McKenzie sold and conveyed to Thomas Burke, who, prior to the sale and conveyance to Rose & McKenzie, and by them to him, had full knowledge of the plaintiff's claim and right to redeem: that by a mortgage dated 29th June, 1872, Thomas Burke conveyed the land to Rose & McKenzie, to secure $1,050, and interest.

The defendants admit all these allegations by their answers, except the notice to Rose & McKenzie, and to Burke, of the plaintiff's claim.

They thus admit that the plaintiff was the owner of the property, that she employed James Peterkin as her agent to negotiate a loan for her, that he did so; that the deed to MacFarlane, though absolute in its terms, was only intended as a security; that the plaintiff offered to re-pay

the amount borrowed, with interest and costs; that MacFarlane refused to receive them, claiming to hold under the deed as absolute owner, and that with the intention to cheat and defraud (the plaintiff) he sold to Rose & McKenzie.

Upon all these points there was no issue between the parties,—the plaintiff had no need to give evidence upon them,—and I assume the defendants admitted them, because they well knew it would have been useless to deny them. The admission of the agency of James Peterkin is further important as shewing in what sense some expressions in the evidence are to be understood, when it is said that MacFarlane gave *James Peterkin* a right to redeem, which has been construed to mean that no such right was given to the plaintiff; but the agency being admitted, it is clear that the expressions must be read as giving a right to the plaintiff through her agent James Peterkin. The ownership of the land by the plaintiff, is not denied by the defendants, and no doubt is cast upon its perfectly lawful character, nor do they claim that James Peterkin was the owner, and the plaintiff is admitted to have the right to redeem; it is impossible then, for any purpose in this suit, to assume that James may have been the real owner. For a similar reason we cannot construe the language of some of the witnesses to mean that the transaction with MacFarlane was a conditional sale, the plaintiff did not need to qualify or contradict them, as the pleadings admitted the transaction to be one of mortgage.

In a case of this character where the defendants admit the plaintiff to have been cheated and defrauded by MacFarlane, and rely for a defence upon their ignorance of any right in the plaintiff, it is the duty of the Court to scan carefully the evidence to ascertain that the defendants are as innocent as they claim to be.

Before examining the evidence, I observe that the rule so much relied on formerly, that an answer denying statements made in the bill must be contradicted by two witnesses, or by one witness, corroborated by attendant circumstances, (*Boulton* v. *Robinson*, 4 Gr. 109,) may,

by the recent changes in the law of evidence, be rendered inoperative. If a plaintiff does not choose to examine the defendant, the rule will remain in full force, and the answer must be contradicted by one witness and something more; but if the defendant is put in the box and contradicts himself, or is discredited, or if the Judge, upon sufficient grounds, disbelieves him, then I apprehend the answer is of no more value than an unsworn pleading.

The answer of Rose denying notice was not impugned, but notice to his partner McKenzie, if established, would be equivalent to notice to him and would bind him. *Collyer* on Partnership, sec. 443 6th ed.; *Story* on Partnership, sec. 107. McKenzie, by his answer, says he is not aware that the land was, after the conveyance to MacFarlane and prior to the purchase by Rose & McKenzie, ever claimed to be the land of the plaintiff, or that she ever claimed to have any interest therein, and he was first aware of said pretended claim on or about the 12th of January, 1875, when served with the bill in this cause. McKenzie was cross-examined upon his answer, and he was subsequently examined at the hearing of the case. In his cross-examination he says he understood that *John* Peterkin owned the land before MacFarlane got it; that he made an arrangement with *John* Peterkin some years before he got the deed from MacFarlane, two or three years, to take timber off the lot to build a line fence; he made all the fence except the stakes; about one and a-half or two and a-half years after building the fence, he went to cut stakes for it; that Alexander Peterkin forbid him to cut the timber; that he had a conversation with the plaintiff about a white ash tree he had cut and offered to pay for it; that this was between the time he got the first rails off and the time he got the stakes; the plaintiff said she owned the lot at that time and that he had cut the ash tree; that MacFarlane told him that he had paid the money for the land to *John* Peterkin.

When examined as a witness he says he understood the plaintiff had sold to MacFarlane. He supposed he had

cut the tree when she held the land. He cut the ash tree nine months before he cut the stakes: he cut it in the spring, the stakes in the fall. When he was cutting the stakes the Peterkins, James and Alexander, came along and forbade him to cut. He then appealed to James Peterkin if he had not agreed to let him have the timber for a line fence. This cutting took place about four years before he bought from McFarlane, and that this time is more correct than that he had stated to the Master, that he recollected better. (This would place the cutting in 1867.) He heard that James Peterkin had a claim or promise on the land; that MacFarlane had promised to give the land back to James. The plaintiff, in speaking to him about the stakes told him the land had been hers. That MacFarlane told him he had paid the money to James. When he cut the ash stick he understood the land belonged to the plaintiff, and went to pay her for it.

I think it is the fair result of this evidence, that after building the fence under some alleged agreement with *John* or *James* Peterkin, it is uncertain which, as McKenzie states it to be sometimes with the one, sometimes with the other, and in the spring of 1867, he cut an ash tree, and being informed the land was the plaintiff's, he went to pay her for it; that nine months later, still in 1867, he was cutting stakes for the fence when he was forbidden by James and Alexander; that he saw the plaintiff in regard to them, and was told by her that the land had been hers. This all took place after the land had been deeded to MacFarlane, and McKenzie was not a stranger to these parties, he lived on the adjoining lot. The discrepancies as to some statements in his two examinations are striking. The agreement as to the fence is now with John, now with James,—the money for the land is paid by MacFarlane now to John, now to James. He never heard of the plaintiff's claim till served with the bill, and yet in 1867, he was told it was hers, and he went to see her about the timber he cut; and if these discrepancies do not entirely invalidate his testimony, they shew at least that it cannot

be considered as entitled to implicit credence, and justify the Court in placing reliance on other testimony at variance with his, while the facts of which he speaks form a basis for the corroboration assumed to be required to the plaintiff's evidence.

Alexander Peterkin, the plaintiff's husband, tells us that soon after MacFarlane got the land, he found McKenzie working at a tree on the lot, and accused him of stealing it. He told him the property belonged to his wife. McKenzie pretended not to be aware of that, and said he thought the land belonged to MacFarlane. Alexander Peterkin told him MacFarlane had only a deed on the land for borrowed money, and until such time as it should be redeemed. This is a clear and explicit contradiction of the answer,—there is no doubt a conversation took place—that it was about an ash tree—soon after MacFarlane got the place—this is clear from McKenzie's evidence. But McKenzie denies that he knew the plaintiff had any right which Alexander Peterkin affirms.

It seems that James was present on this occasion. James is examined, but it is uncertain whether he refers to this occasion, or to the occasion of cutting the stake, nine months later. It does not seem to me of much importance, for it is equally a denial of the answer that McKenzie did not know of plaintiff's title till the bill was served. James says after MacFarlane had the land, he found McKenzie cutting timber on the land, and had a conversation with him about it, and (told him) that as MacFarlane had promised to return the land no timber was to be cut on the place. I do not understand him to say MacFarlane agreed that no timber was to be cut on the place, but that he states it as a corollary from the right to redeem that the person entitled to redeem had the right to the timber. James told McKenzie that MacFarlane had got a deed of the place and had given his lifetime to redeem it. This is also a clear contradiction of the answer, and shows that McKenzie was informed in 1867 of the plaintiff's right.

The case might rest there without recurring to the plaintiff's evidence, but when her evidence is referred to, corroborated as it is by the witnesses I have quoted and the defendant, there seems to me not a shadow of a doubt that McKenzie did know of her right to redeem years before he purchased.

The plaintiff says it could not have been a year after MacFarlane got the place that she had a conversation with McKenzie. She talked to him about timber he had taken off the land. He said her husband and he had a disagreement about the timber. She told him that MacFarlane had advanced $500 on the place, and that he would give up the land as soon as the money he had paid was made up. McKenzie asked her when he came if she was not the owner. He came to settle about timber he cut. She told him the land was in McFarlane's hands, and that the timber was to remain on the land till it was redeemed.

The date of this conversation is fixed by both parties, plaintiff and defendant, to 1867.

I think the evidence of the plaintiff is amply corroborated by the defendant, by Alex. Peterkin and by James Peterkin, and that the evidence fully justifies the finding of the learned Chancellor: that McKenzie had notice of the plaintiff's claim before he bought.

The answer of Burke denies that Rose & McKenzie had notice of the plaintiff's claim before they bought; and that he is not aware that the plaintiff ever claimed to have any claim thereto after the sale to MacFarlane and prior to the sale to him, and he is informed and believes that the plaintiff never claimed any right to the land during the time it was owned by Rose & McKenzie; that he bought *bona fide* for a good and valuable consideration, viz., $1,550, and without notice of any claim of the plaintiff thereto. He does not say the consideration was paid; and indeed, from his examination it appears that he only paid $550 down and gave a mortgage for the balance.

It is plain that Burke had notice before payment of the purchase money, but before considering the effect of such

notice I propose to ascertain what the evidence is as to his knowledge at the time of or before his purchase.

Burke was cross-examined on his answer, and was examined at the hearing as a witness. On his cross-examination he denies that he ever heard that the plaintiff had any claim to the land. He says he never heard anything particular about any claim that any of the Peterkins had to the land. Catharine said something to him about MacFarlane and James Peterkin, as to their dealings. He heard that Jim was in trouble. Plaintiff told him that James sold the land to McFarlane on account of the trouble. *He does not remember whether she told him as to the terms on which the land was bought.* This conversation was before Rose bought the land. Before Rose bought, John Peterkin said he would go to McFarlane and ask him if he would sell half the land to Burke, so that Peterkin might get the other half. On his examination in the cause he says that when he bought the place he did not know that Mrs. Peterkin had any claim to the land. James told him MacFarlane owned the land; and he denies the evidence of plaintiff and James Peterkin, to which I shall presently refer. His talk with Mrs. Peterkin was a little while after March, 1871. (He bought in June, 1872.) James wanted him to buy half the land, that he might get the other half. He had previously said it was *John* who proposed to see MacFarlane about it.

Catharine Peterkin, the plaintiff, says that Burke came to her the spring before MacFarlane sold (1871), to see if MacFarlane had agreed to sell half of the land, so that the other half could be redeemed. Burke was going to buy half if she could arrange about the other half. She told him MacFarlane would not sell half to redeem the other. Burke asked her if MacFarlane had got a clear deed of the place, and she said he had got a clear deed, giving McFarlane's lifetime to redeem it, or as soon as the money was made up. Burke said he thought that if MacFarlane had a clear deed that he could give a clear deed. She told

him he could give a clear deed, but not a good title. She saw Burke more than once about the matter.

James Peterkin says he told Burke before MacFarlane sold that the property was the plaintiff's, and that he was doing the business for her. Burke wanted to buy fifty acres, and offered $550 for them. MacFarlane would not agree to sell. James Peterkin explained to Burke that MacFarlane had a deed of the land, but that he had given Mrs. Peterkin his lifetime to redeem it. He told Burke how much money MacFarlane had advanced, and that $500 was the amount required to redeem it.

Both the plaintiff and James Peterkin directly contradict the evidence of Burke, and their story is a natural one; and it connects in so many points with Burke's that it is plain they were not manufacturing it. Burke wanted to buy; he knew the land stood in the name of MacFarlane; he talks with the plaintiff about it, and can give no reason for doing so. It is doing no violence to, but is in harmony with probability, and as it is sworn to, that he did so because because he knew of the plaintiff's right. I think the plaintiff's evidence is fully corroborated by James Peterkin.

With regard to the corroboration needed in this case, it is clear that it does not depend on any Statutory enactment. The contract or agreement with MacFarlane, the dead man, is admitted by all the parties. The only issue is as to notice, and as to that all the parties are alive. The rule requiring corroboration is, I suppose, deduced from *The Merchants' Bank* v. *Clark*, 18 Gr. 594, and that class of cases. But the rule as there laid down is one that bends to circumstances. The learned Vice-Chancellor Mowat says: "I cannot say that either the deposition of the father, or the evidence of the son, was entirely satisfactory; or that I could with propriety attach to this testimony any exceptional weight. There is, on the other hand, in the transaction, much which, viewed from a judicial standpoint, is not free from reasonable suspicion." So that while laying down the general rule, he contemplated

circumstances arising which might justify him in disregarding it. In another case in the same volume (*Northwood* v. *Keating*, 18 Gr. 643, 653), the same learned Judge says: "I am not aware that it has been ever laid down in the Common Law Courts that the testimony of a party must be corroborated by other evidence. The necessity for corroboration in any Court, and the extent of the corroboration to be exacted, must depend on the nature of the case," and he gives instances showing the reasonableness of this rule. And in that case Vice-Chancellor Strong says (p. 669): "I do not understand there is anything in these decisions (quoted by Mowat, V. C.,) to prevent the Court, in a case where there has been no loss of evidence, from making a decree founded on the testimony of a party only."

I apprehend therefore that corroboration was not essential to the plaintiff's evidence, and if the learned Judge who heard the witnesses, gave credit to the plaintiff, he was at liberty to find in accordance with the evidence.

This brings me to the consideration of another question. There is conflicting evidence, enough to have sustained the case of the plaintiff or of the defendants, according as the Judge gave credit to the testimony. Are we, now sitting in appeal, so well able to weigh the evidence as the Judge who heard the witnesses? It may be that the Court has the right to decide in appeal on matters of fact, as well as of law. And this is a power that may usefully and properly be exercised if it should appear that there was no evidence to justify the finding, or if it was conspicuously insufficient for that purpose. But where there is ample evidence on each side to justify a finding in its favour, according as it is believed or not, it seems to me that it ought to be a very exceptional case indeed to warrant us in saying that the Judge ought to have believed one side rather than the other. In the case of *Northwood* v. *Keating*, just referred to, there are some very apposite remarks of Strong, V. C., on this subject. He says, at p. 668: "If the attesting witness Miller had been alive, and had been examined, and after hearing his evidence, as well as that of Mrs. Keating,

my brother Mowat had thought fit to give credit to the defendant's testimony in preference to that of the other witnesses, I should have thought it right, considering the principles which ought to regulate all appellate jurisdictions in viewing the decisions of questions of fact, depending on the credibility of witnesses who have been examined in the the presence of the primary Court, to have held his finding conclusive."

Applying these principles to this case, I think the decision of the Court below on the question of notice, ought not to be interfered with, even if I had failed to see how the conclusion had been arrived at; but here there seems to be, beyond question, amply sufficient evidence to support the finding.

With regard to Burke, it is also to be mentioned that it is clear he had notice before payment of the purchase money. That was all that was necessary, then, to entitle the plaintiff to a decree against him, and the fact of the Legislature having removed this ground of liability for the future, cannot destroy the plaintiff's right. Opinions may, perhaps, differ as to the wisdom and justice of the rule,—many Judges of high authority have supported it as wise, just and equitable.

Assume the owner and purchaser to be equally innocent, for the purpose of testing the principleupon which protection is afforded to the purchaser. The owner, in endeavouring to get possession of his property, finds it occupied by a person who says he purchased it—from one not owner—in good faith, believing he was thereby acquiring the title,—paid the price,—obtained a deed, and went into possession. It does seem a very hard case to deprive him of it. But is it not equally a hard case that the owner of the land should lose it. The belief of the purchaser cannot change the title. It is a matter of opinion. A false opinion does not change the truth of matters.

When necessary to apply to a Court of equity, that Court has said we will give no assistance against such a purchaser, we will leave the owner to pursue his legal remedies.

I admit that practically, in many cases, this has the effect of giving the purchaser a title, for though he may not be able to bring an action against the owner, or those claiming under him, he may against any one else, and the Court will not permit even the owner to interfere with him,—and the Court in deciding which of two innocent persons is to bear the loss caused by the wrong of a third, must be held to have decided in favour of the purchaser.

Even in this case it is a measuring cast which ought to be preferred,—both equally innocent,—the owner must lose his land, or the purchaser the equivalent for it. I know of no reason why the latter should be favoured rather than the former. If a rule had to be established, and some rule was necessary for the security of titles, a toss-up would have decided it with as much equity.

The rule is at variance with that adopted by one-half of our jurisprudence. For such a defence was unavailing in the Courts of Common Law. The right of the owner was there preferred. No matter how honest, how innocent, the purchaser may have been, he was obliged to yield the land to him who had the title. The protection afforded by the maxims referring to descents, discontinuances, mere claims, and collateral warranties, were devised for a different purpose, and went but a short way towards the rule in equity.

It was also at variance with the rules of the civil law. Unless the purchaser under that system had possessed long enough to effect a *usucapion*, or a prescriptive title, under the laws on that subject, it was no avail to him that he had bought with the design of acquiring title, had honestly believed he was acquiring it from a person who was the owner, and occupied it under that intention. The defence of purchase for value without notice, in such a case was unknown. The equity was decided in favour of the owner.

It is true that to obtain a title by prescription, *good faith* was only exacted at the time of going into possession under the purchase, and if he could retain possession for the requisite length of time, though he were to become

aware of the defect, and from that time possessed *malafide*, the owner could not recover. But at any time before the lapse of the fixed limit the owner could assert his right, notwithstanding the original good faith of the purchaser.

In considering this subject, the title is viewed as an integral whole, and the whole is not lost by the owner till the whole is acquired by the purchaser. During the lapse of the time the owner's right is not gradually diminished as each day or week passes, but he retains the ownership of the whole till the expiry of the last day.

While the Courts of Equity were ready to say to a purchaser who had innocently bought a defective title, paid his purchase money, obtained a conveyance, and gone into possession,—as between you and the owner the equities are equal, we will not interfere against you. The case was very different when the purchaser had not paid all his purchase money, or had not got a conveyance; the equities were not equal, the purchaser was not in the position of an owner, he had at most acquired but a partial interest in the property,—and adopting the analogy from the Statutes of Limitations, the title being an entire whole, no part of it was lost to the owner till all was lost. It is no answer. to say he had a contract for the whole, for *ex concessis* his vendor had no title, and no proceeding the purchaser might take on the contract could terminate in perfecting the title. Nor is it any answer, in this case at least, whatever it may be under the new law, that the whole purchase money was secured by a mortgage that has passed into other, it may be innocent hands. For the mortgage was made to the vendors, who knew of their defective title, and although *choses in action* are now assignable at law, they are still affected by all the equities that attached to them in the hands of the original mortgagee. With the evidence we have in this case, if a decree be made in favor of the plaintiff, it would be impossible for Rose & McKenzie to recover on the mortgage against Burke, so it likewise must be for any present holder of it.

It is no doubt a hardship on the purchaser if he shall be

unable to recover back the money he has paid; but it is a greater hardship on the owner to tell him: you shall only have back your land on paying to the purchaser what he has paid to a person who had no right to receive it,—while the purchaser has a right of action for this purpose, *quantum valeat*, that the owner has not.

The rule in England is perfectly clear in favour of the owner, that the whole purchase money must be actually paid, not merely secured to be paid. In the American Courts opinions are divided, some adopting the English rule, others protecting a purchaser to the extent of the money paid.

I fail to see, therefore, that the English rule, the one binding upon us, can fairly be characterised either as inequitable or unjust. It has been acted on for centuries, and received the sanction of Judges of the highest eminence.

It is true that for the future this will, to a great extent be merely a speculative question, as the Legislature has protected the purchaser who may not have paid one cent of his money: R. S. O., ch. 95, sec. 9. It would obviously be improper in me to question the wisdom or the equity of such an enactment, nor in this case do I need to do so, for the act is not retrospective, and I am quite within the limits of the Act while saying that for the past the rule was good; for the future it will be bad. This case is in the past, and the rule as to it is good, that when the purchaser before the entire completion of the transaction becomes acquainted with the defect in the title, the equity of the owner preponderates. *Donelli Comm.*, Lib. IX., ch. 19, and Lib. IV., ch. 24 and ch. 22; *Cod.*, 3, 32, 3, D. 6, 2, 16 and 17; *Bartoli Comm.*, in D. 41, 3, 5; *Basset* v. *Nosworthy*, 2 White and Tud. L. C. 1, and the English and American notes; *Beames* Pleas in Eq. 233.

But it is said that it is a hard rule, an iniquitous rule, and that any circumstances should be seized to evade it. And for that purpose that the defendants should be permitted to set up the defence of the Registry law, and thus throw obstacles in the plaintiff's way that it is supposed she may find an insuperable difficulty in overcoming.

Some of the circumstances relied on for this purpose are, that James Peterkin was in trouble when he conveyed to the plaintiff, and was afterwards her active agent when dealing with the property. But I fail to see how this can afford any ground for indulgence to the defendants. James Peterkin is not claimed to be the owner of the property. It is admitted that he is not, and that the plaintiff is, and that he was her agent, and in that capacity his conduct was natural and proper, and there is no pretence that the defendants were misled by him, or by his actions. Nor does it seem to me that the plaintiff has been guilty of such laches as to disentitle her to relief; no such case is made by the answer. The Statute of Limitations has not barred her right, and as she is admitted to have been entitled to an equity of redemption, nothing short of a statutory bar should be allowed to extinguish it. She is not coming begging a favour of the Court, she comes asserting a right, and because she has delayed some years in asserting it, is no reason for enabling the defendants to endeavour to frustrate it.

But these reasons or excuses for giving this indulgence to the defendants, rests on the supposition that they are unaffected with notice before their purchase. I have already stated that my conclusion from the evidence is, that they had such notice; and to permit the setting up of such a defence would not be in furtherance of justice, but of knavery and fraud.

Further, I think the permission to amend is a matter that lies in the discretion of the Judge, and that this Court has no power to reverse his decision. It is true that in *Gilleland* v. *Wadsworth*, 1 App. R. 82, the present Chief Justice of this Court, then Mr. Justice Moss, expressed an opinion that the section as to amendments in the Administration of Justice Act of 1873, was as imperative as the section in the Common Law Procedure Act, as determined in the case of *The Bank of Montreal* v. *Reynolds*, 24 U. C. R. 381; but however valuable that opinion may be, and no one esteems more highly the ability of that learned Judge, than I do, it was not necessary for the decision of the case. It is said

in the report that Burton and Patterson, JJ. A., concurred in the decision, but I assume it is not to be taken as evidencing a concurrence in anything more than what was decided. The only decision upon this point, reported, is one of the Court of Chancery in *Machar* v. *Vandewater*, 26 Gr. 83, in which it is determined that permission to amend is discretionary with the Judge. And I humbly venture to think that the argument in favour of this view, greatly preponderates over that against it. If the Legislature, in enacting the Administration of Justice Act, had intended to make this section imperative, they surely would have adopted the language of the Common Law Procedure Act, which had already received judicial construction. But the language of the two sections in the two Acts, are very different, and the reasonable conclusion would seem to be that they were intended to receive a different interpretation.

For the reasons given above, however, I think that even if imperative, it is not shewn to be necessary for any of the purposes mentioned in the Act, and should not now be made.

If, however, the Court should come to the conclusion that the amendment ought to be made, it would be obviously unjust to dismiss the bill. The plaintiff ought to have an opportunity of meeting this new defence. We cannot assume she has no further evidence than she has given, and even a registered title may be defeated by evidence of notice. My present impression is, that the evidence already given, proves notice sufficiently to affect a registered title, but certainly the plaintiff should have liberty to supplement it.

I think the decree is very favourable to the defendants in the allowance for improvements, and had the plaintiff appealed on that ground, it would deserve much consideration, whether a *mala fide* possessor should be so liberally dealt with. The plaintiff appears to be satisfied however.

In my opinion the decree should be affirmed, and the appeal dismissed, with costs.

MORRISON, J. A., concurred with BURTON and PATTERSON, JJ. A.

Appeal allowed.

CURRY ET AL. V. CURRY.

Statute of Frauds—Parol evidence—Statute of Limitations.

The bill sought an account of the rents and purchase money received by the defendant upon the lease and sale of lot 18, containing 100 acres of land, in which it alleged that the plaintiff's father (now dead) and the defendant, his brother, were jointly interested. It appeared that the deceased had for years assisted the defendant in improving and cultivating this lot, on which they lived. The defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. It was shewn that the defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which the plaintiffs insisted was 50 acres of this lot; but this deed could not be produced owing to its either having been lost or destroyed. The defendant denied this, but he admitted having given his brother a deed of the adjoining lot 17 for the purpose of enabling him to vote. Lot 17 contained 120 acres, and the defendant's only interest in it was, that the person from whom he purchased lot 18 had accidentally cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to the deceased had never been registered. In 1856 the defendant made a lease of lots 17 and 18 to F., which transaction was negotiated by the deceased, and in 1875 the defendant sold lot 18 to F., with the concurrence of the deceased. The defendant swore that the deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiffs, but his evidence was not consistent or corroborated.

Held, affirming the judgment of SPRAGGE, C., (26 Gr. 18) that the evidence shewed that the deceased was the owner of half of lot 18; that the whole of the land having been sold with his assent, and the whole of the purchase money received by the defendant, it was so received for their joint use and benefit, and that the plaintiffs were therefore entitled to an account.

Held, also, that the right to claim the purchase money did not arise till the sale, and therefore the Statute of Limitations did not prejudice the plaintiffs' claim.

This was an appeal from a decree of Spragge, C., reported 26 Gr. 1. The facts are stated there, and in the judgments on this appeal.

The case was argued on the 15th and 16th January, 1879 (a).

Maclennan, Q. C., for the appellant. The case made by the bill is, that the defendant and his deceased brother Philip had a legal title as tenants in common to lot No. 18, from the year 1850 to the year 1875: that in the

(a) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

the year 1875, the defendant sold and conveyed the land and received the purchase money, and that he is accountable to the representative of Philip for half of it. There is no authority for this position. A tenant in common is not accountable to his co-tenant for the purchase money he receives where they have the legal estate in common. The defendant's deed, apart from the registry laws and the statute 27 Elizabeth, could not pass more than his own interest. If Philip had a legal title, as it is contended he had, to 50 acres, either in common or in severalty, it still remained in him and never passed to the purchaser. Philip was present at the sale and conveyance, and saw the money paid. If he gave notice of his title to the purchaser, his title was not affected, even though his deed was unrecorded. If he did not give notice he lost his title, but that would give him no right to a share of the purchase money. The same reasoning applies *a fortiori* if Philip's title was in severalty of the east fifty acres and not an undivided half. Assuming it proved that the defendant in 1850, gave Philip a conveyance, either of a several half or of an undivided half of lot 18, it is not pretended or proved that such conveyance was other than voluntary. There is no attempt to prove any consideration. When, therefore, the defendants sold and conveyed the land for valuable consideration to Ferguson, the deed to Philip became fraudulent and void under 27 Elizabeth ch. 4. The case of the plaintiff is not assisted by the Act 31 Vic. ch. 90, because Philip's deed was never recorded. Nor had Philip or his representatives any equity against the purchase money by reason of the alleged deed of 1850: *Daking* v. *Whymper*, 26 Beav. 568. But it is not proved that the deed was of lot 18. No witness is called who can say that the deed was of 18; and the only evidence on the point is the deposition and alleged admissions of the defendant. He positively denies that the deed was, or was intended to be, of lot 18 or any part of it. He says the description may have been the east half of 18, because the whole lot was called 18. Lot 18 contained 100 acres, and lot 17 contained 120. They

had been bought together, and were improved together. They were occupied together and leased together until 1861. The east half of 18, therefore, if that was the description, would mean lot 17 and no part of the actual lot 18. The depositions of the defendant are uniform and consistent that it was 17 that was intended, that it was 17 in fact, that the deed was voluntary, and that it was made to enable his brother to vote. The alleged admission of the defendant, sworn to by the Fraynes, prove nothing as to which lot the deed contained. Philip had been in possession of 17 as well as of 18, and at the date of the conversation related by the Fraynes, Philip had left and Ferguson was in possession under a lease evidently prepared by a professional hand of the whole described as lots 17 and 18. The lease was dated in April, and the conversation was in August, 1856. If the defendant is to be believed, the deed was of lot 17. If he is not to be believed, there is no proof either way. The conduct of parties and the probabilities of the case are with the defendant. There is no evidence of any claim by Philip up to the time of his death. He was present at the sale. Mr. Leet acted for the vendor and prepared, and Philip signed the declaration as to the title deeds, yet not a word was said by Philip of any claim, and he allowed the defendant to receive and retain the purchase money. If he had any claim why this silence and acquiesence in the receipt and retention of the purchase money. None of his family or friends ever heard of his claiming or recovering any rent for twenty years. The defendant swears to the contrary, and there is other evidence the other way. The declaration signed by Philip is conclusive that he had no claim. If the plaintiff's contention is well founded, the deeds were as much his as the defendants, and he had the custody. They could not both have the custody, and having once got possession lawfully, Philip could not have been deprived of them. The declaration was intended to say to Ferguson, and did say to him, I had the deeds, but they were my brothers. I had not, and have not now any interest

in the land. If he had an interest, there was no object in concealing it. If he had, he might and should have been deprived of them. The evidence shews that in or about the month of July, 1865, the defendant and his deceased brother Philip had a settlement of their accounts with reference to the Kitley lands, and the defendant then paid to the deceased the sum agreed upon by them as owing to him for improvements made on the said Kitley land, and that the said late Philip Curry then destroyed whatever deed had been given to him by the defendant. The Statute of Limitations is a bar to the claim. The bill was filed on the 8th day of April, 1878, and Philip was was out of possession from the year 1855, without acknowledgement of title or receipt of rents, and the defendant was in possession. He cited *Notes* v. *Crawley*, 29 L. T. N. S., 267 ; *Kerr* on Fraud, 306, 307.

Blake, Q. C., (*Garrow* with him), for the respondents. The bill alleges that defendant and Philip Curry were tenants in common of lot 18, and equally entitled. It is immaterial whether they were tenants in common or seized in severalty each of one half, the main question being, was Philip entitled to one half of the lot. If he was, then it necessarily follows that he was entitled to half of the rents and of the purchase money. It is admitted that there was a conveyance to Philip, but the appellant claims that it was of lot 17 and not of 18, and was given to enable Philip to vote. The conveyance must have been of either 17 or 18, or part of them, 17 was unpatented and practically worthless, and defendant's title was simply that of a squatter. Of so little consequence was lot 17 considered that the whole was called lot 18, as defendant says. Yet the defendant's letters of 18th October and 19th November, 1856, shew that Philip's conveyance was considered capable of being registered, and that it conveyed a valuable and beneficial interest, capable of being taken in execution by his creditors, consequences which followed if the conveyance was of part of lot 18, a patented lot, but which were quite inapplicable if of 17. Moreover, the evidence shews that Philip, after the conveyance to him, was assessed for and

voted on lot 18 as owner. The evidence of Fraynes, together with the letters before referred to, and the defendant's own depositions in this cause and in *Re Curry*, fairly establish that the conveyance was of an interest in lot 18 and not 17; in fact the defendant, in his examination in *Re Curry* taken in October, 1877, before he became aware of the existence of the letters before referred to, admitted that he had given a conveyance to his brother Philip of one half of lot 18. He had previously denied to Frayne and Armstrong that Philip ever had a deed of any part of the land in Kitley. In his examination in the same matter in January, 1878, the letters which shew that Philip's interest was beneficial, and was his own, having meantime been discovered and put in, the defendant for the first time advanced the statement that the conveyance was of lot 17. Again, in his examination in this cause he practically admits that the conveyance was of one half of lot 18, although he says it was intended to cover 17, only. It can be of no consequence what the intention was, but this alleged intention is improbable. Philip, on coming to the west in 1856, to where defendant then was, paid over some money to defendant upon account of the Kitley transaction, yet he retained the title deeds of lot 18, until they were stolen, many years afterwards. Immediately, or shortly before leaving Kitley, the evidence shews that Philip leased, in defendant's name, both lots to Ferguson, who continued the tenant until he became the purchaser in 1875, paying $80 per annum rent until he lost lot 17 and $60, afterwards. $20 having been apparently the lot 17 proportion of the rent, yet defendant received the whole, not even accounting to Philip for the rent of lot 17. These and many other circumstances given in evidence shew that the conveyance to Philip was not of lot 17. The whole subsequent conduct of the parties down to Philip's death, is consistent with, and only explicable upon the assumption for which the respondents contend that the advice contained in the before mentioned letters from the defendant to Philip, was accepted and acted upon. The respondents contend that in pursuance

of such advice, and of an understanding between the defendant and the late Philip Curry upon the basis of the said letters, the conveyance to Philip afterwards lost, was suppressed and never registered, and that the defendant, in connection with the suppression of Philip's deed, assumed the relationship towards Philip in respect to his interest in the lands in Kitley, of a trustee, and in this capacity received Philip's share of the rents, and finally of the purchase money, for which, less the payments made from time to time, he is sought to be charged in this suit. Assuming that Philip was entitled to a half interest in lot 18, nothing occurred to divest him of his interest until the sale to Ferguson, and the evidence was amply sufficient to shew that in receiving Philip's share of the rents and purchase money, defendant was at least Philip's agent, and as such, accountable in this cause. The sale and conveyance by the defendant to Ferguson who had no notice of Philip's title having been made with the knowledge and consent of Philip who stood approvingly by, knowing that defendant was selling, and Ferguson purchasing the whole estate, and not a half interest, was sufficient to divest Philip's interest as between him and Ferguson, by estoppel irrespective of the registry laws, and upon such sale and conveyance Philip's only recourse was against the purchase money in defendant's hands. The evidence warrants the assumption that Philip refrained from insisting on a recognition of his interest in lot 18 before, and at the time of Ferguson's purchase on the representation of the defendant that he would duly account to Philip for his share of the rents and purchase money, and Philip relying on such representation, having lost his property, the defendant must be held to such representation; in seeking to evade it he seeks to commit a fraud. The Statute, 27 Elizabeth, ch. 4, has no application. Moreover, it is not pleaded, was not urged at the hearing, and is heard of for the first time in the reasons of appeal, and for these reasons should not be considered. The legal presumption is in favour of the conveyance and against it having been voluntary and therefore fraudulent. The absence of con-

sideration which creates the presumption of fraud must be proved by the defendant, and the only evidence upon this point is his own, which being unconfirmed is insufficient after Philip's death. It is not shewn that the conveyance in question was voluntary, but on the contrary, a fair result of the evidence is that it was made upon valuable consideration. If the object of the conveyance was as defendant alleges, to enable Philip to vote without being really the owner of the property, the defendant is estopped on grounds of public policy from alleging that such conveyance was voluntary or from any cause void, or from taking advantage in any way of the alleged want of consideration: *Phillpotts* v. *Phillpotts*, 10 C. B. 85. It is submitted that the case of *Daking* v. *Whimper* in 26 Beav., does not place the true construction upon the 27th Elizabeth, especially in view of the amendment thereto by the Ontario Statute, 31 Vic. ch. 90, and that *Leach* v. *Dean*, 1 Ch. R. 78, cited, and the decree given in *Townend* v. *Toker*, L. R. 1 Ch. App. 461, more correctly construes said Statute in view of said amending Statute. The respondents should, if necessary, be held entitled to the benefit of the Statute 31 Vic. ch. 9, because the omission to register until it became impossible to do so by the loss of the conveyance was owing to the defendant's advice. The respondents further contend that registration can only be necessary under the last mentioned Statute where the contest is between a voluntary grantee and a subsequent purchaser for value, and that where the contest is between the original grantor and the voluntary grantee, the conveyance whether registered or not is binding for all purposes, as against the grantor, and the grantee is entitled to the purchase money. Under any circumstances the respondents are entitled to an account of the rents received by defendant prior to the conveyance to Ferguson, and to be paid by Philip's proportion of such rents. The Statute of Limitations can have no application. Aside from the payments made to Philip by defendant from time to time, the last in May, 1875, which alone would prevent the operation of the statutes, Philip

was in actual possession in 1856; the land was sold in May, 1875, and he died in July of the same year, leaving the plaintiffs then (and one of them still) infants. But in any event a new right accrued against the defendant upon the receipt by him of the purchase money, and further, from the trust relationship existing between the parties the statute would not apply. They cited *Haigh* v. *Kay*, L. R. 9 Ch. 469 ; *Ambrose* v. *Ambrose*, 1 P. W. 321 ; *Bayspoole* v. *Collins*, L. R. 6 Ch. 228 ; *Clarke* v. *Willott* L. R. 7 Ex. 313 ; *Jarratt* v. *Aldham*, L. R. 9. Eq. 463.

March 10, 1879 (*a*). MOSS, C. J. A.—The attention of the learned Chancellor was mainly directed to the question whether the deed, which the defendant admits that he had executed to his deceased brother Philip, conveyed Lot No. 17, as the defendant now alleges, or the half of Lot No. 18, as the plaintiffs contend. Although the title set up by the plaintiffs in the bill, and notably in the prayer, seems to be a tenancy in common, there is a distinct allegation that in the year 1850 the defendant, who desired to enter the Methodist ministry, when about to leave home to enter upon his profession, made a conveyance of one half of Lot No. 18 to his brother, and the answer expressly denies that he gave any such deed. This issue the Chancellor found in favour of the plaintiffs, and I am unable to see any sufficient reason for differing from his conclusion.

Commencing with the fact that there was a deed given about the time that the defendant left Kitley to enter upon his circuit, it is difficult to believe that the conveyance was of Lot No. 17, and that its sole object was to enable the deceased to vote. He had then arrived at an age when he would naturally be thinking of striking out some career for himself. He had for years been lending the defendant all the assistance in his power toward improving and cultivating Lot No. 18. The assignment was a very likely one between the brothers, and certainly was not disadvan-

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tageous to the defendant. The other lot was swampy and of inferior quality. The only interest which the defendant possessed in it, was that the person from whom he purchased Lot No. 18 had accidentally cleared a few acres beyond the boundary line, and that accordingly the inspectors of clergy reserves in 1844 reported to the department that he claimed the lot, but he was never recognized as a purchaser and never made any payment on account of the land. In fact, so little value was attached to it, either by him or his brother, that in 1861 it was sold by the Crown to another person at $1.35 per acre. It does not seem to me that the defendant's allegation, that he made a deed of Lot No. 17 to give his brother the franchise, is well founded, for as I understand at that time there was no right to vote upon unpatented land. I have carefully examined the defendant's letters to his brother, in the light of the indisputable facts, and without going the length of saying that that they are absolutely irreconcileable with the theory that the deed then held by his brother was of Lot No. 17, I am satisfied that the reasonable conclusion from their terms is that the defendant was writing to him as the owner of a valuable interest in Lot No. 18. But I must add that the attempt to effect such a reconciliation seems to me to be a failure. Again, upon an appeal from the judgment of his Lordship, we are bound not to overlook the evidence of Frayne and his wife, who appeared to him to be truthful and intelligent witnesses. The important point in their statements, or at least in that of Frayne, is that the defendant spoke of his brother having a deed of fifty acres of the place on which he lived. That must have referred to half of Lot No. 18, and could not possibly have referred to the whole of 17, which contained one hundred and twenty acres. There are other circumstances corroborating the conclusion of his Lordship upon this question of fact. (The Chief Justice here referred to parts of the evidence bearing upon this subject.) It is true, as the Chancellor has pointed out, that the non-assertion of claim for so many years by

Philip, and his concurrence and participation in the sale by the defendant without setting up any right in himself, are circumstances adverse to the plaintiff's position. But the prosecution of the action against Philip, the determination of his brother and himself to elude payment of the verdict, the shifts and embarrassments to which this led, the intimate and confidential terms upon which the brothers dealt with each other, seem to weaken, if not to destroy, their effect. On the whole I entertain no doubt that we ought to accept the Chancellor's decision upon this question of fact.

But then there arises the point, what is the result in law of this finding? It is argued that even then the defendant is not liable to pay half of the purchase money, because he did not and could not by his deed convey his brother's share of the property. This contention, however, does not meet the real point. The substance of the plaintiffs' claim is that their father and the defendant, owning the land between them, a sale was effected for their joint benefit. They say that their father concurred in and aided in carrying out the sale, because he was to receive his proportion of the price, and that he did not disclose his interest to the purchaser because this was unnecessary between his brother and himself.

It can hardly be disputed that if the simple facts were that he was the owner of half of the land under a deed that had never been registered and had been lost, and that he participated in the sale, the presumption would be that it was made for the joint benefit of himself and the owner of the other half, who appeared upon the registry to be the sole owner. Such conduct on his part would not lead to the inference that he had abandoned his rights. His silence as to his interest and his active assistance in the sale would only be explicable on the supposition of an agreement that the proceeds were to be received for their joint use and benefit. We have then to enquire whether this presumption has been displaced. I confess that in my view there are circumstances disclosed and inferences suggested in the evidence, which tend towards the idea that Philip

had relinquished any legal claim he conceived he ever had in this lot. With great deference, I think the learned Chancellor is mistaken in thinking that his deed was stolen from Philip's house. The evidence of one of the plaintiffs shews that the only deed in the box was that under which the defendant held the whole lot. I incline to believe, or at least I strongly suspect, that the deed was destroyed by Philip himself, and that he did not deem himself entitled to any interest in the land enforceable in a Court. But this theory has not been advanced by the defendant. If the deed were deliberately destroyed for the purpose of obliterating any trace of Philip's interest, it is incredible that this should have been without the defendant's knowledge. If he, who best knows the truth, does not put forward this view, it cannot be regarded by the Court.

Assuming the existence of the deed, there is nothing to shew that the rights under it were abandoned or released.

In this view the questions raised upon the assumption that the deed was voluntary, and upon the effect of the Statute of Limitations, find no place. Even if the deed were without valuable consideration, Philip would have the right to his share of the proceeds, if the sale were made for their joint use and benefit. The defendant could not then set up that under the Statute of Elizabeth he could defeat Philip's rights by his independent sale to a purchaser for value, because that was not the character of the sale actually made, which was with the concurrence of Philip.

Then his right did not arise until the sale, and was not barred when the suit was commenced.

Similar considerations apply, although it may be with diminished force, to the receipt of the rents.

While I have failed to recognize any satisfactory ground for relieving the defendant from the liability imposed upon him by the decree, I confess that it is not without reluctance I have arrived at that conclusion. That feeling however, arises from a repugnance to the establishment of stale claims not advanced by the persons best cognizant of their real foundation, and this claim seems to me to

have that flavour, because I can perceive no good reason for Philip's conduct, if he thought he had the rights now asserted. But in that feeling, sympathy for the defendant has no place, because I think that if our decision does him wrong, he has himself to blame. If his statements had not been, in the Chancellor's opinion, wanting in fairness, candour, and consistency, the result might have been very different.

I think the appeal should be dismissed, with costs.

PATTERSON, J. A.—The plaintiffs, who are daughters and heirs-at-law of Philip Curry, pray that it may be declared that the defendant and Philip were tenants in common of lot number 18, in the first concession of the township of Kitley, and equally entitled thereto, and that the defendant was a trustee for Philip of one-half of the rents and purchase money, and that an account may be taken on that footing, and Philip's share applied in due course of administration of his estate of which the defendant is administrator.

This prayer is supported by the allegations that, for many years before Philip's death, he and the defendant, who was his elder brother, were tenants in common of the lot; and that in 1875, they sold it for $1,500, to one Ferguson, who paid the purchase money to the defendant, part of it before Philip's death, and part since that event: that the purchaser had been for many years tenant of the land, and had paid rent to the defendant: that the lot originally stood in the name of the defendant, although both brothers lived on it and worked it, and were equally entitled to it: that in 1850, the defendant conveyed half the lot to Philip: that in 1855, Philip being threatened with a suit for damages, the defendant advised him not to register his deed, which Philip had, up to that time, kept unregistered; and that the defendant proposed to make a lease in his own name, but for their joint benefit: that accordingly Philip did not register his deed; and the defendant leased the lands and kept them under lease in his own name till they were sold:

that the defendant paid to Philip in his lifetime various sums on account of the rents, the last such payment being in November, 1873, but he never fully accounted for them: that Philip was present on the occasion of the sale, when $950, on account of the purchase money, were paid to the defendant as ostensible owner, who had alone executed the conveyance; and that the defendant paid Philip $50 out of the $950, retained $100 for himself, and placed the balance in the bank to await the payment of the rest of the $1,500.

The defendant denies that Philip had ever any interest in lot 18; or that he made any deed to Philip except one for lot 17, which was an unpatented Clergy Reserve lot, and which defendant says he made to enable Philip to vote.

The evidence given by the plaintiffs is directed to shew, not that the brothers were tenants in common of lot 18; but that the defendant who had the fee of the whole lot, conveyed one-half of it to Philip in severalty in the year 1850. The history of this deed and its ultimate fate have been the subject of a good deal of the evidence, and have been remarked upon by the learned Chancellor in his judgment. Those remarks have been referred to on the part of defendant as indicating that the evidence had been, in the some particulars, misapprehended; and it certainly does seem that his Lordship did not apprehend all the details exactly as they appear upon the shorthand reporter's notes before us; but upon the question of tenure, and therefore on a point which, if the plaintiff is entitled to succeed, may affect the proportion of the money belonging to Philip's estate, there is no room for holding that the brothers were tenants in common. If Philip had any title to lot 18, he derived it from the defendant's conveyance of one specific half of the lot.

It is not shewn why Philip did not register his deed between 1850 and 1855. In the latter year he was apprehensive of a suit for damages, and wrote to the defendant, from whom he received two letters which are in evidence. The defendant in these letters gives some advice to Philip

about disposing of his property so as to put it out of the way of an execution; and amongst other observations, makes the following one: "As you say that you did not record your deed, I think you will have nothing to fear respecting the land. The lease of which you speak would answer. I suppose when filling it up it might be dated back to 1849. It was June of that year I went to Drummond Circuit. The sum a year might be £12 10s., or as you please, so that a sufficient sum might be due to secure whatever property or stock you keep on the land." This was written on 18th October, 1855. It seems to point to a suggestion made by Philip and approved by the defendant, that a lease should be made to Philip of whatever land Philip occupied, so that the defendant under colour of a distress for rent might prevent the chattel property being sold under *fi. fa.* The other letter, which is dated a month later, shews that the suggestion was not acted upon; as in it the defendant advises Philip to prepare at once to leave the place, and to sell off the stock in the defendant's name; and he speaks, as he had also done in the first letter, of plans for providing Philip with land in the township of Adelaide. The only reference in this letter to the Kitley farm is in the words, "the place can be rented if we cannot sell it to advantage." I share the Chancellor's disbelief of the defendant's oath that *we* in this sentence meant the defendant and his wife. I have no doubt it meant the defendant and Philip. The expression is consistent with Philip having an interest in the farm which comprised lots 17 and 18; and this seems to be the whole of its force as a piece of evidence.

Philip removed from Kitley to the western part of the province where the defendant lived, in 1855 or 1856, and does not appear to have again visited the farm. He had been assessed for it—or at least for lot 18—up to 1856. After that I suppose Ferguson was assessed for it.

On the 14th of April, 1858, the defendant made a lease of both lots 17 and 18 to Ferguson for three years, at $80 a year. This transaction was negotiated by Philip. Fer-

guson continued to occupy after the term expired, the rent being latterly reduced to $60, partly because lot 17 had been patented to a stranger, and partly by way of a concession on account of bad crops. In 1875 the defendant sold lot 18 to Ferguson the tenant, Philip assisting at this transaction by making a statutory declaration respecting the loss of the title deeds which had been stolen from Philip's house, and which he declared to belong to the defendant.

There were money transactions from time to time between the brothers. Philip did in fact receive $50 of the money paid for purchase money by Ferguson. But the only evidence of these matters is that of the defendant on whom the plaintiffs had to rely as their witness; and he says that no money was paid to or received by Philip, either as rent or as purchase money, or as money to which he was entitled in respect of any interest in the land.

There is no evidence that Philip's deed was kept unregistered by any advice or machination of the defendant; nor is there any ground for holding, nor is it contended, that the defendant was trustee of the land for Philip.

The plaintiffs' case on the evidence is that Philip owned one-half of lot 18 and the defendant the other half; and that the defendant, with Philip's concurrence, leased and sold the whole lot, and received the rent and purchase money. And it is contended that the proper inference from all the evidence is that he so leased and sold as well for Philip as for himself.

The judgment delivered by the Chancellor is occupied for the most part, if not altogether, with the discussion of the evidence touching the defendant's deed to Philip. He finds the fact to be that it was, as alleged by the plaintiffs, a deed of one-half of lot 18. I do not think reasons have been presented of sufficient strength to warrant an interference with that finding, although the evidence, as we read it, may in some details differ from the note of it made by the Chancellor. The impression created by the whole

evidence is strongly in favour of the conclusion arrived at, and it is not our duty to determine whether, if we had to decide as in the first instance, that conclusion would necessarily be forced upon us.

The defendant contends that the fact thus found is by no means sufficient to support the plaintiffs' claim, because he argues that the deed from the defendant to Ferguson could operate only as a conveyance of the defendant's estate in the land, and so left Philip's estate untouched; and that if it afterwards cut out Philip, under the operation of the Registry law, that was owing to Philip's own fault in omitting to register his deed or to inform Ferguson of his interest in the land.

He also contends that Philip's right, if any, was to the land itself, and that the plaintiffs are barred by the Statute of Limitations, which began to run against Philip when Ferguson took possession as tenant of the defendant in April, 1856, and continued to run after the sale to Ferguson in May, 1875, and until the twenty years had been fulfilled.

A little consideration of these positions makes it clear that they cannot be admitted as criteria of the defendant's liability.

The statute would doubtless afford an impregnable defence to Ferguson if the heirs of Philip were to attempt to eject him; and, apart from the statute, the share taken by Philip in the sale and conveyance of the land would have always estopped him and his heirs from asserting that any title remained in him. It therefore cannot be doubted, that even without the aid of the Registry law, and without any reference to the alleged voluntary character of the conveyance by which Philip claimed, a good title to the whole lot passed to Ferguson.

But this is not directly material, because if the defendant in privity with Philip, sold, or assumed to sell property of which Philip was acknowledged to be owner or part owner, and received the price, the money received would, to the extent of Philip's interest, be received to his use, whether an effectual conveyance was made to the purchaser or not.

On the other hand, if the defendant, wrongfully pretending to own property which in truth belonged to Philip and of which he was not trustee for Philip, induced a stranger by that pretence to buy it and pay him its value, the result would be very much what it is argued took place here. No property would pass beyond the interest of the ostensible vendor. The vendee might have his action for the deceit or upon his covenants, as one or other of those remedies happened to be appropriate; but no wrong would have been done to Philip, whose title would not have been affected by the transaction, and the money received would not be received to his use.

No doctrine is more firmly established than that which permits one in whose name another has, without authority, professed to act, to adopt the act done with whatever benefit or loss may result from it. It is equally well settled that if one wrongfully disposes of the goods of another, and receives their price, rendering himself liable to an action of trespass or trover, the owner may waive the tort and sue for the money received. In the case of *Lamine* v. *Dorrell*, decided early in the last century, and reported in 2nd Lord Raymond, at p. 1216, we have the authority of Holt, C. J., for both of these propositions; and numerous cases since that date affirm the same doctrines. But I have not met with any case which has gone the length of deciding that where no tort has been committed for which an action will lie; where there has been merely the execution of an inoperative deed of lands which the grantor does not own; and when the sale and the conveyance have been made and the purchase money received altogether in the ostensible grantor's own name; the real owner can insist upon ratifying the sale and receiving the money. That would just be the kind of case for which the Registry law provides, when a man sells the same land twice over; and which must have presented many occasions for bringing actions for the money if such actions would lie.

The plaintiffs' claim in the action before us is for money had and received. If the personal representative of Philip

Curry had been any one but the defendant, this should have been an action at law by the personal representative against the defendant for money received to the use of Philip in his lifetime, and to the use of the personal representative after Philip's decease. The right to recover would depend on the character of the transactions with Ferguson. If they were dealings by the defendant with the property on Philip's behalf as well as on his own, the action would lie against him. It would not be material whether, at the time of the transactions, the defendant had had it in his mind to deal honestly or dishonestly with Philip, if, as between the brothers themselves, Philip was acknowledged to be interested in the property, and by mutual understanding it had been entrusted to the management of the defendant. If this were the case the defendant would have been liable to account to Philip, in an action for money had and received, for what was received in respect of his interest, either for rent or purchase money, in Philip's lifetime; and would be liable to the personal representative for the same money, and also for the purchase money received after Philip's death; the six years' limitation, of course, being applicable.

It thus seems to me quite clear that our inquiry touching the defendant's liability to account for either the rent or the purchase money, is not the simple one whether the deed was or was not a deed of part of lot 18; and that we are not at all concerned with the operation of the defendant's deed to Ferguson; but that the plaintiffs' right to recover depends upon the character of the dealings between the brothers, at the times when the defendant received the moneys, having been such as to create the relation of principal and agent, or at least to give Philip the right to adopt what was done, and thus to insist that that relation existed.

Upon this question we have considerations presented by the evidence which tend in opposite directions. The defendant can point to the facts that from April 1856, down to time when Philip lost his life by an accident,

during all of which time he was in the full enjoyment of vigour of body and mind, he is not shewn to have asserted any right to the land, or to the rent or purchase money; the embarrassment which pressed him in 1850, having long ceased, and there being no apparent reason why he should not have claimed whatever belonged to him; that there was no occasion in 1875, for concealing his ownership, if it existed, or for treating the land, both by his own acts and by his statutory declaration, as belonging to the defendant and not to him; and that his claim to a share of the $950, paid in cash, was perfect as soon as the money was paid, and yet he is not shewn to have asserted such a claim.

These are undoubtedly considerations of weight and cogency; but their force is spent upon the question of the real ownership of the land. If we take the fact to be that Philip owned half of it, there is but slight support left for the contention that the letting and the sale, both of those transactions having been effected in concert with Philip, and partly by his instrumentality, were not on his behalf, as well as on behalf of the defendant himself.

On the question of ownership we have, at this stage of our enquiry, to start with the fact that the defendant had conveyed to Philip one-half of the lot. There is no pretence that it was ever divested by any conveyance. The contention is, that it was conveyed to Philip without valuable consideration, and only to give him an apparent qualification to vote, and that after Philip left Kitley, and moved westward, he abandoned all claim to the land, and even burned the deed, saying he would not want to vote any more in Kitley.

The direct evidence of this is given by the defendant himself, and is very shadowy in its character. In fact it does not touch lot 18 at all, as the defendant all along asserts that the only deed was of lot 17. The deed he speaks of in his evidence is, however, the same deed mentioned in his letter of October, 1850, and what he says there is not easily reconcilable with the theory that he was speaking of what, as between him and Philip, was so

much waste paper. That letter, beyond question, treated the land, whichever may have been the lot, as really Philip's, and the non-registration of the deed as a fortunate accident which enabled them to conceal the ownership from the judgment creditor. Setting aside the circumstance that to hold that Philip, having had a deed of 18, had, by some process or understanding, retired from the ownership of it, and revested it in his brother, would be to find in the defendant's favour a state of facts not asserted in his answer. It would be impossible upon the evidence before us to overrule the finding that a beneficial interest had passed to Philip and remained in him.

Then we must not forget that we have the defendant's version without that of Philip, and that caution in accepting his account of things is indicated by ordinary prudence, by the statutory requirement of corroborative evidence, and by the indistinct and unsatisfactory character of his narrative itself. It is only from him we learn that Philip did not receive moneys as for his interest in the land, and did not press for his share of the payments made; though one certainly should have expected Philip's family to have known more than they seem to do about the matter, if their father had been really asserting a claim.

If Ferguson was let in as tenant of the defendant alone, in 1856, in order to conceal from him and from the public the real state of the title, it need create no surprise to find that in selling to him, it was not thought necessary to volunteer explanations which would be of no use, while they would not have been entirely creditable to the parties.

The force of the circumstances I have alluded to connected with the sale and the receipt of the moneys is thus somewhat diminished.

Upon the whole, while it is impossible to feel perfect satisfaction with a decision on either side, or to escape the feeling that in balancing the effect of the testimony, there cannot be so much certainty as to exclude doubts, I do not think the defendant can reasonably complain, if in the con-

fusion, he has done what he could to cause, the Court should fail to see things just as he understands them.

There is the story about the deed to enable Philip to vote on the clergy lot, from which it is not easy to gather what the defendant's idea of the electoral qualification was in 1850; and there is the scheme developed in the letters of October and November, 1855, for making it appear that the defendant either owned all Philip's property, or had power to seize his chattels for rent which was never due—this last feat to be accomplished by antedating a lease, the very thing which in *Regina* v. *Ritson*, L. R. 1 C. R. 200, was held to be forgery—and there is an account given of the settlement and burning some papers, which is not very intelligible.

On the whole the position may be put in this manner:—Philip had a deed of half-lot 18; the presumption that that was a conveyance for value is not displaced, but is rather supported by the evidence; it is not shewn that Philip reconveyed to the defendant, but the contrary appears; the defendant, with Philip's concurrence, let Philip's land and received rents, and afterwards sold it and received the purchase money. From these facts the proper inference is, that he received those moneys for the use of Philip and of his representatives.

This inference might be rebutted by the evidence that although the land was Philip's, the money was received with his assent as the defendant's money, and not as Philip's. No sufficient evidence of this has been produced; therefore the plaintiffs are entitled to hold their decree.

BURTON and MORRISON, JJ.A.. concurred.

Appeal dismissed.

Ulrich v. National Insurance Company.

Insurance company—Reference to arbitration—Pleading.

In an action on a policy of insurance the defendants, amongst other pleas, pleaded that the policy was subject to a condition that in case difference should arise touching any loss or damage, after proof had been received in due form, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the Company under the policy; and that no suit or action against the Company for the recovery of any claim by virtue of the policy should be sustainable in any court of law or Chancery until after an award had been obtained fixing the amount of the claim in manner therein provided, and averred that before the suit differences did arise touching the plaintiff's alleged loss or damage, but the same had not been submitted to impartial arbitrators, nor was any award fixing the amount of the plaintiff's claim under the policy by reason of the alleged loss or damage made before the commencement of the suit.

There was no averment of a written request to refer the dispute.

There was a demurrer to the replication to this plea, but the plaintiff took no exception to the plea. At the trial the facts alleged in the plea were established, and the Judge entered a verdict for the defendants upon this plea. It appeared that no such written request to refer had been in fact made.

The Court of Queen's Bench made absolute a rule to enter a verdict for the plaintiff, holding that the defendants, not having complied with the statute 39 Vic. ch. 24, O., could not avail themselves of the condition.

The Court of Appeal, without pronouncing upon that question, held that the condition, even if valid, had not been broken, because there had been no written request to refer the dispute to arbitration; and therefore dismissed the appeal.

This was an appeal from the judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the defendants, reported 42 U. C. R. 141. The facts are stated there, and in the judgments on this appeal.

The case was argued on the 13th November, 1878 (*a*).

Ferguson, Q. C., for the appellants. The appellants, who are authorized by 38 Vic. ch. 84 D, to make contracts of insurance in all parts of the Dominion, on such terms as may be agreed on, cannot be prohibited from making such contracts by an Act of the Provincial Legislature. Yet such is the effect of 39 Vic. ch. 24, O. It was beyond the power of

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(*a*) *Present.*—Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.

the Local Legislature to make such a law, as by the British North America Act it is expressly declared that the Parliament of the Dominion can make laws "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and the subject of insurance is nowhere so exclusively assigned to the Local Legislature. It is not mentioned in sections 91 and 92. Besides, under our constitution, unlike that of the United States, the Provincial jurisdiction is a mere offshoot of the Federal power, and the residue of the power is in the Dominion Parliament: *Leprohon* v. *Corporation of Ottawa*, 2 App. R. 522. When therefore any doubt exists as to which possesses jurisdiction, the decision must be in favour of the federal power. We contend, moreover, that "Insurance" comes under "Trade and Commerce," which is wholly within the jurisdiction of the Dominion Parliament. It will be urged that the Local Legislature had power to deal with this subject as one affecting "property and civil rights" under sub-sec. 13 of sec. 92. But that is confined to civil rights within the Province; and 39 Vic. ch. 24, O., deals with civil rights which may be outside the Province. The locality of the debt is the domicile of the creditor: *Sills* v. *Warwick*, 1 H. Bl. 690; and if the appellant lived on the other side of the River Ottawa, in the Province of Quebec, he would have had his civil rights there, yet the policy would have been entered into and in force in Ontario. If 39 Vic. ch. 24, O., is not in force, then the appellants are entitled to succeed on the eighth plea. The evidence clearly shews that the respondent was guilty of fraud. He referred to *L'Union St. Jacques de Montreal and Belisle*, L. R. 6 P. C. 31; *Dow* v. *Black*, L. R. 6 P. C. 280; *Re Goodhue*, 19 Gr. 366; *Paul* v. *Virginia*, 8 Wall. 168.

McMichael, Q. C., for the respondent. The Act in question is not *ultra vires*, as it comes within the subject of "Property and civil rights in the Province," which is exclusively assigned to the Local Legislature. The Dominion Parliament have no greater powers in regard to

Insurance Companies for Dominion purposes than to give them a corporate existence and capacity to contract, but the form and conditions of the contract are subject to the law of the Province. *Lex loci contractus* is the rule of construction, and the contract must be construed according to the laws of the Province in which it is made. This Act does not take away the power conferred upon the appellants to contract; it merely says that they must contract subject to certain conditions. The ascertainment of the claim by arbitration was not a condition precedent to the right to sue. He cited *Parsons* v. *Citizens' Ins. Co.*, 43 U. C. R. 261.

March 10, 1879 (*a*). PATTERSON, J. A.—The action is for the amount of loss upon goods insured by the defendants in a building in the city of Ottawa.

At the trial the plaintiff had a verdict upon all the issues except that upon the eighth plea. Cross rules were obtained; the defendants asking by their rule to have a nonsuit or verdict for defendants entered, or a new trial, on the ground that the verdict "was contrary to law and evidence, and the weight of evidence, and against the charge of the learned Judge who tried the cause," and the plaintiff asking to have a verdict entered for him on the issue joined on the eighth plea, on the ground that on the facts appearing at the trial the policy was not subject to the stipulations or conditions relied on in that plea; or for judgment *non obstante veredicto*.

The eighth plea alleged that the policy was subject to a condition that in case differences should arise touching any loss or damage, after proof had been received in due form, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy; and that no suit or action

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, J J. A.

against the company for the recovery of any claim by virtue of the policy, should be sustainable in any Court of law or Chancery until after an award had been obtained fixing the amount of the claim in manner therein provided; and averred that before the suit differences did arise touching the plaintiff's alleged loss or damage, but the same had not been submitted to impartial arbitrators, nor was any award of arbitrators, fixing the amount of the plaintiff's claim under the policy by reason of the alleged loss or damage, made before the commencement of the suit. There is no averment of a written request to refer the dispute.

The third, fourth, fifth, sixth, and seventh pleas, also relied upon breaches of conditions.

Besides the joinder of issue upon these pleas, there was a second replication, alleging that the policy was entered into and in force in the Province of Ontario after 1st July, 1876, with respect to property in the Province of Ontario only, and not elsewhere, and that the conditions mentioned in the six pleas in question were not mentioned or contained in the Fire Insurance Policy Act, 1876, or in conformity with any of the statutory conditions mentioned in or provided for in that statute, and that the requirements of that statute, as to varying the statutory conditions, had not been complied with.

The defendants demurred to this replication, in addition to joining issue upon it.

The rules and the demurrer were argued together. The Court discharged the defendants' rule; made the plaintiff's rule absolute; and gave judgment for the plaintiff on the demurrer.

From this decision the defendants appeal.

The facts having been found against the defendants upon all the pleas but the eighth, our inquiry is limited to the ground covered by the eighth plea and the special replication. Although the formal grounds of appeal assert the right of the defendants to succeed upon their other pleas, we cannot interfere with the verdict upon them.

The learned Judge before whom the case was tried

notes that he directed a verdict for the defendants upon the eighth plea as a matter of law. I am not sure that I understand this. The facts alleged in the plea seem to have been established, and probably this was why the verdict was so directed; but the plea strikes me as clearly bad, because it does not aver a breach of the condition on which it relies. That condition did not make arbitration a prerequisite to the plaintiff's recovery, unless one of the parties to the contract requested it in writing. No such request is averred; none was shewn by the evidence to have been made; and we have inquired how the fact was, and have been furnished by the defendants with the statement that no written request was made, although some oral proposals are said to have been made to the plaintiff to submit the dispute to arbitration.

The plaintiff does not appear to have taken any exception to the plea on this ground, although with his joinder in demurrer he took some exceptions to the seventh plea. He now moves for judgment *non obstante veredicto*, but I apprehend the defect would be cured by the verdict, as the written request may have appeared in evidence; and to sustain the defence it ought to have appeared; and for the purpose of this motion it is of no consequence that we know it did not so appear: 1 *Wms.* Saund. 261; *Nickells* v. *Goulding*, 21 U. C. R. 366.

The omission of the plaintiff to give formal notice of exception to the plea will not prevent the Court giving judgment "according as the very right of the cause and matter in law appears unto them": R. S. O. ch. 50, s. 129; and having regard to the duty of the Court in this particular, and to the arrangement by which these issues in fact and in law were argued together, we are at full liberty to consider the case as disclosed by the evidence, without embarrassment from any defect in the statement of it upon the record.

Looking at the policy as printed *in extenso*, we find that the condition is correctly set out in the plea, and that the arbitration is only provided for when two events have

concurred, viz., a difference touching any loss or damage after proof thereof, and the written request of either party; and further, that it is only an award fixing the claim "in the manner above provided" that is attempted to be made a condition precedent to the right of action. "In the manner above provided" must obviously include "in the circumstances in which it is above provided that there shall be a reference to arbitration."

In a case where no difference whatever existed as to the amount of the loss, but where the liability was disputed by reason of some such collateral matter as an undisclosed incumbrance or a double insurance, or even where there was no dispute at all, but the company simply would not pay a claim which they admitted to be correct, the suggestion that there must be an arbitration to fix the amount would be simple absurdity. Yet the condition must either be read as requiring it in every case, or only in the cases designated by the two concurring circumstances, one of which, viz., the request in writing, is entirely wanting here.

The constitutional question discussed in the Court below and before us, therefore does not arise, as under no state of circumstances deducible from the evidence before us can the defendants make the absence of an arbitration available for their defence.

The view I have taken of the condition was not urged in argument before us. It is not distinctly put forward in the formal reasons against the appeal, even if intended to be indicated, and from the absence of any notice of exceptions to the plea, or allusion to the subject in the notes we have of what took place at Nisi Prius, it appears to have escaped attention in the earlier stages of the case. I have therefore examined the policy and the conditions and the evidence the more anxiously, fearing that I had overlooked something which ought to modify my opinion, but I have not found anything which has that tendency. The defendants' covenant is to pay the amount of loss or damage estimated according to the actual cash value of the property at the time of the loss, in sixty days after the proofs of the

same required by the company shall have been made by the assured, and received at the company's office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of the policy.

The eighth plea concedes that the proofs have been made and received at the office, because the differences which may be referred are only those which arise after proof of the loss and damage has been received in due form. Then has the loss been ascertained and proved in accordance with the terms and provisions of the policy? The policy contains the usual specification of requisites in the proof and ascertainment of loss. We have in evidence some correspondence about these, particularly as to copies of invoices, production of books and papers, and protecting the goods, and the evidence otherwise shews that the company's officers did not overlook what was provided in this respect. Everything in fact is proved, or is found by the verdict, to have been duly performed, except this reference to arbitration. In its absence can it be said that the loss has been *ascertained* in accordance with the terms of the policy? There can be no room found for the argument that the terms of a stipulation that there shall be a reference at the written request of either party, require such a reference at all events. Therefore, there having been no request, and all the other methods provided for ascertaining the loss having been exhausted, the direct terms of the covenant are satisfied, and the liability of the defendants to pay the loss is established. The eighth plea does not controvert this. It does not go to the defendants' liability. It is framed as a plea in abatement; and without denying the liability to pay the loss, sets up the agreement that no action shall be brought for the recovery of any claim by virtue of the policy until after an award has been obtained fixing the amount *in the manner above provided;* which, as I have said, must be taken to mean *when it is above provided that there shall be an award.* This construction is not only indicated by the common sense of the case, but it is supported by the circumstance that there is nothing

else to refer the words to, because *the manner* cannot here mean the formal steps in the appointment of arbitrators or the conduct of the proceedings, for no directions on that subject are given.

I have not met with any condition like that before us. The questions decided in *Scott* v. *Avery*, and other cases of that class, have usually arisen either upon instruments which contained an express agreement that there should be a submission to arbitration, or in which the obligation was only to pay a sum ascertained or fixed by a referee, without the contingency of a preliminary request to refer, or in cases in which the performance of all preliminaries or readiness to perform them were averred. Some recent cases which may be usefully referred to are *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 237; *Dawson* v. *Fitzgerald*, L. R. 1 Ex. D. 257; *Edwards* v. *Aberayron Ship Insurance Society*, L. R. 1 Q. B. D. 563; *Alexander* v. *Campbell*, 41 L. J. Chy. 478, per Bacon, V. C.; *Pompe* v. *Fuchs*, 34 L. T. N. S. 800, Q. B. D.

I think therefore the appeal must be dismissed with costs.

MOSS, C. J. A., BURTON and MORRISON, JJ. A., concurred.

Appeal dismissed.

LAWRENCE V. KETCHUM.

Will—Description of land devised—Parol evidence.

The testator, who made his will in 1866, amongst other devises bequeathed "all my real estate situated in the township of Mono, in the county of Simcoe." It appeared that in 1862 he had purchased lots 1 and 2 in that township. In 1863 Orangeville was incorporated as a village and annexed to the county of Wellington, lot No. 1 being detached from Mono and comprised within Orangeville.

Held, affirming the judgment of the Common Pleas, 28 C. P. 406, that lot 2, which exactly fitted the devise, alone passed thereunder; and that parol evidence was inadmissible to shew that the testator intended to include lot 1 also.

THIS was an appeal from the Court of Common Pleas, discharging a rule *nisi* to set aside the verdict for the plaintiffs, and enter it for the defendant, 28 C. P. 406. The facts are stated there, and in the judgments in this appeal.

The case was argued on the 14th November, 1878 (*a*).

M. C. Cameron, Q.C., *C. Robinson*, Q.C., and *Boyd*, Q.C., for the appellants.

Bethune, Q.C., and *Beaty*, Q.C., for the respondents.

The arguments were substantially the same as in the Court below. The following additional cases were cited for the appellants: *Harman* v. *Gurner*, 35 Beav. 478; *Webb* v. *Byng*, 1 K. & J. 587-592.

March 10, 1879 (*a*). MOSS, C. J. A.—The question upon this appeal seems to me to be settled by decisions, of which the applicability cannot be doubted, nor the authority impugned. The material facts are short and simple. On the 27th of March, 1866, Jesse Ketchum devised to the defendant all his real estate in the township of Mono, in the county of Simcoe. The will contains a devise of residue, under which the plaintiffs claim. At that date, and at the time of his death, the testator was seized of lot No.

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

2, in the 1st concession of the above mentioned township. It thus appears that he had property which exactly fitted the description in the will, and he had no other property which, at the date of the will or subsequently, could with accuracy be described as in the township of Mono, in the county of Simcoe. Looking then at the language of the disposition and its surrounding circumstances, its meaning is perfectly plain and unambiguous. There is no latent ambiguity arising *dehors* the will, when its terms are applied to the existing state of the testator's property. But it is further shewn that the testator was seized of another lot in the immediate vicinity, which it is contended formed with this a single property, and was so treated by the testator. This lot had originally been in the township of Mono, being lot No. 1, in the 1st concession, and together with lot No. 2 belonged to Jesse Ketchum, Jr., the testator's son, up to August, 1862, when it was sold by the sheriff under execution. On the 23rd of September, 1862, the sheriff gave the testator a deed, in which the property is described as all and singular those certain parcels or tracts of land, situate, lying, and being in the township of Mono, in the county of Simcoe, and province of Canada, being composed of lots Nos. 1 and 2, in the 1st concession west of Hurontario street, in the said township of Mono. In 1855 the greater part of lot No. 1 had been laid out into village lots, and formed part of the unincorporated village of Orangeville. Under the authority of the Municipal Act, by-laws of the county of Simcoe and the county of Wellington were passed on the 22nd of December, 1863, incorporating the village of Orangeville and annexing it to the county of Wellington. Thereafter the property now claimed was properly describable as in the village of Orangeville, in the county of Wellington, and could not in any sense be said to be in the county of Simcoe.

The defendant's contention is that the testator purchased this property with the object of saving it for his son; that in 1862, soon after the purchase, he made a will devising it to him; that he always held it and intended it to be for

his benefit; that the present will was made in pursuance of that intention, but in favour of the defendant on account of her husband's financial difficulties; and that the description, following that in the deed, was copied from the earlier will, the testator not having observed, or having forgotten, the legislative change. Upon a balance of probabilities this commends itself to one's judgment, as probably representing what occurred, but I think that a clear and well-defined rule of law stands inexorably in the way of the reception of this evidence. It is sought to be adduced, not for the purpose of removing any difficulty in applying the words of the will to a subject matter, but for the purpose of controlling the construction of the language, by shewing that he used it in a sense different from its strict sense, and that he had an intention different from that disclosed in the will. To adopt the language of Tindal, C. J., in *Miller* v. *Travers*, 8 Bing. 244, cited in the judgment in the Court below: "It is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will." Here there is no trace of intention, *to be collected from the will itself*, to give the property in Orangeville to the defendant. The cardinal rule of construction given in *Abbott* v. *Middleton*, 7 H. L. 68, directs attention to the necessity of the intention being collected from the will itself. It is thus enunciated, at p. 88: "Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence as is necessary in order to enable us to understand the words which the testator has used." Here there is no difficulty in understanding the words used, but we are asked to give them a different and extended meaning from that which attached to them at the time the will was made—a meaning which is neither suggested by the terms of the will, nor necessary in order to find the subject matter of the devise.

Without spending time in reviewing the numerous authorities which have been referred to and discussed in the learned judgment of the Chief Justice, it seems sufficient to say that the principles enunciated in *Webber* v. *Stanley* 16 C. B. N. S. 698, are decisive of the point in controversy. The judgment of Erle, C. J., has ever since been treated as a full and accurate exposition of the English law upon this subject, and it is only necessary to refer to the passages cited from it by Hagarty, C. J., to perceive how completely it disposes of the contention of the defendant.

The quotations from *Smith* v. *Ridgway*, L. R. 1 Ex. 332, and *Hardwick* v. *Hardwick*, L. R. 16 Eq. 698, are particularly apposite. In the latter case, Lord Selborne remarked that it is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence, so as to include anything which any part of those terms does not accurately fit. It is manifest that here the terms of description do fit lot No. 2, which is in the county of Simcoe, and that the attempt is to enlarge them by extrinsic evidence, so as to include property which was not, at the date of the will, in the county of Simcoe, and which the terms do not accurately fit. In these and other cases cited by the learned Judges in the Court below, *Webber* v. *Stanley* has been mentioned with marked approval, and implicitly followed. I may add a reference to the subsequent decision in *Homer* v. *Homer*, L. R. 8 Ch. D. 758, where Baggallay, L. J., treats it as established law, that where a testator has devised all his lands at any particular place, extrinsic evidence is not admissible for the purpose of shewing that he intended to pass other lands not situated at that particular place, either by reason of such other lands having been enjoyed with the lands at the specified place for a lengthened period of time, or of the testator having dealt with them as one property, or of his having been in the habit of referring to them as forming one property under one distinguishing name.

I entirely agree with the views expressed by the learned

Judges of the Common Pleas, and think that this appeal must be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

Appeal dismissed.

PARSONS V. THE CITIZENS' INSURANCE COMPANY.

Insurance—Statutory conditions—R. S. O., ch. 162—Powers of Provincial Legislature.

The policy sued on, which was issued by the defendants, who were incorporated since the passing of R. S. O., ch. 162, by the Dominion Parliament, had not endorsed upon it the statutory conditions referred to in the schedule to the above act, but had conditions of its own which were not printed as variations in the mode indicated by the Act.

Held, affirming the judgment of the Court of Queen's Bench, 43 U. C. R. 261, that the defendants could not resort to their own conditions avoiding the policy for non-disclosure of a previous insurance, nor to the statutory conditions, as they were not printed on the policy.

Held, also, that R. S. O., ch. 162, was not *ultra vires*, as the Legislature of Ontario had power to deal with an insurance company incorporated by the Dominion Parliament in reference to insurances effected in Ontario and that a contract for insurance was not one affecting "Trade and Commerce."

Per BURTON J.A., that a person insured under such a policy is entitled to avail himself of any condition endorsed on the policy in his favour, or of any statutory condition, notwithstanding that it is not printed upon the policy, but the assurers are only entitled to avail themselves of such conditions when they have them printed upon their policy.

Per SPRAGGE, C., apart from conditions, an insurance company may defend on the ground of misrepresentation or concealment, which would vitiate the contract.

THIS was an appeal from a judgment of the Court of Queen's Bench, discharging a rule *nisi* to set aside a verdict for the plaintiff, reported 43 U. C. R. 261. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 4th February, 1879 (*a*).

(*a*) *Present.*—MOSS, C.J.A., SPRAGGE, C., BURTON, and MORRISON, JJ.A.

C. Robinson, Q. C., (with him *J. T. Small*,) for the appellants. The policy in question here cannot be held to be a policy without any conditions. The judgment of Gwynne, J., in *Geraldi* v. *Provincial Ins. Co.*, 29 C. P. 321, as to this point is unanswerable. It is clear that neither party intended to enter into an absolute unconditional contract of insurance. The statute must either be read as making policies subject to the uniform conditions it provides, or to those endorsed on the policy. It is not stated in the Act that unless these conditions are on the policy they shall not be considered part of it; it merely says that they shall be deemed to be part of every policy, and that they shall be printed on it. It is unnecessary, however, to say anything more on this question as it is dealt with so fully and ably by Gwynne, J., in the case referred to. But we further submit that the Local Legislature had no power to pass the Act, Rev. Stat. O., ch. 162, so far as regards the appellants, who are a company incorporated by the Dominion Parliament. This ground of appeal was recently argued before this Court in *Ulrich* v. *National Ins. Co.*

M. McCarthy, for the respondent. The judgment appealed from has placed the only sound interpretation possible upon the statute. The Act was passed to protect insurers from insurance companies, and for this purpose it declared that unless endorsed on the policy the statutory conditions were not to be considered binding as against the insured, nor variations of them unless printed in accordance with the Act, but the insured is entitled to avail himself of them if he desires, although they are not so endorsed. He cited *Wright* v. *Sun Mutual Ins. Co.*, 29 C. P. 221; *Fitton* v. *Accidental Death Ins. Co.*, 17 C. B. N. S. 122; *Parsons* v. *Standard Ins. Co.*, 43 U. C. R. 603; *Bunyon* on Insurance, 114.

March 10th, 1879, (*a*). BURTON, J. A.—Whether the plaintiff is entitled to recover in this case must depend upon the construction to be placed upon the Revised

(*a*) *Present.*—MOSS, C.J.A., SPRAGGE, C., BURTON and MORRISON, JJ.A.

Statute of the Legislature of Ontario, ch. 162, entitled, an Act to secure uniform conditions in Policies of Fire Insurance, and its power so to legislate as regards this company.

The policy sued on was issued by a company incorporated by the Parliament of the Dominion, since the passing of that Act, and has not indorsed upon it the statutory conditions referred to in the schedule to that Act, but conditions of its own, which are not made as variations in the mode indicated by the Act; and it is contended that the defendants cannot resort to their own condition avoiding the policy for non-disclosure of a previous insurance, by reason of their non-compliance with the requirements of the Act, nor to the statutory conditions, inasmuch as they are not printed upon the policy.

I think the plaintiff's contention is well founded.

As I read the Act of Parliament, the defendants cannot evade the provisions of the Act by omitting to print upon their policies the statutory conditions, but a person assured under such a policy is entitled to avail himself of and statutory condition in his favour, notwithstanding that it is not printed upon it, whilst the assurers are only entitled to avail themselves of those conditions when they have complied with the law and printed them upon the policy.

Having thus complied with the law by printing the statutory conditions, they are then entitled to vary them in the way pointed out by sec. 4, by adding under them, in ink of a different colour, words to the following effect:

Variations in conditions.

This policy is issued *on the above statutory conditions*, with the following variations and additions.

There is then to be an intimation that the variations are by virtue of the statute, so far as by the Court or Judge before whom a case is tried relating thereto they shall be, and reasonable to be exacted by the company.

Sec. 5 then enacts, that no such variation, addition, or omission, shall, unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, be legal

and binding *on the insured;* and no question shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable; but on the contrary, the policy shall, *as against the insurers,* be subiect to the statutory conditions only, unless the variations be so distinctly stated.

The intention then of the statute appears to be this:

If the policy is printed without conditions, or with other than the statutory conditions, it shall nevertheless, in favour of the insured, be subject to the statutory conditions, or to the conditions endorsed upon the policy, though the insurers shall not be allowed to set up either against him.

If the law is complied with, by printing the statutory conditions, those conditions will be equally binding on the insurer and insured.

And in no case can a variation be made, except by printing the statutory conditions, and then calling attention to the portion varied, omitted, or added to, in the particular manner indicated in the statute. But these alterations are subject to the decision of the Court, as to their just and reasonable character.

Such a construction appears to give full effect to the words, "as against the insurers," to be found in the third and fifth sections, and I can see nothing inequitable or unfair to the assurers in it. If they are advised that an alteration or addition is required, or that some particular condition should be omitted, they have the fullest opportunity of making such alteration or omission, after having called the attention of the insured to it, subject only to its not being found by the Court to be an unjust or unreasonable variation.

Mr. Justice Gwynne, in a judgment recently delivered in *Geraldi* v. *The Provincial Insurance Co.*, 29 C. P. 321, reads the statute as if the words, "as against the insurers," were omitted.

He says the statute enacts that the statutory conditions shall be deemed part of every policy; but that is not the language of the statute. It is only *as against the assurers*

that the statute declares they shall be deemed part of it. And so again when the insurers have printed the "statutory conditions," and have added variations, but not in the mode directed by the statute, they are debarred from setting up the variations, but the disability is confined to them, the statute expressly declaring that, as against them the policy shall be subject to the statutory conditions *only*, leaving the insured free to take advantage of any condition which operates in his favour.

I am of opinion, therefore, that the defendants are not in a position to set up the defence of a prior insurance, unless the legislation be, as is contended, *ultra vires.*

The only pretence for this is based upon the circumstance that the policy in this case was granted by a company incorporated by the Dominion Parliament.

That policies of insurance, being mere contracts of indemnity against loss by fire, are like any other personal contracts between parties governed by the local or provincial law, can, I assume, admit of no question. Then can it make any difference that one of the contracting parties here is a corporation created under a charter granted by the Parliament of the Dominion.

The Parliament of the Dominion has no power to authorize a company of its creation to make contracts in Ontario, except such as the Legislature of that Province may choose to sanction. That Legislature may, if it thinks proper, exclude such corporation from entering into contracts of insurance here altogether, or they may exact any security which they may deem reasonable for the performance of its contracts.

The artificial being created by the charter is authorized to make such contracts as come within its designated purposes, but the Legislature granting the charter can give no privileges to be exercised within any of the Provinces, except with their assent and recognition; and it follows, as a matter of course, that these may be granted upon such terms and conditions as the Provinces think fit to impose.

Within their respective limits, each Legislature is supreme

and free from any control by the other. The Dominion Parliament has no more authority to interfere with, or regulate, contracts of this nature within any of the Provinces, than has the Legislature of the Province to regulate promissory notes or bills of exchange. The terms upon which insurance business is to be carried on within the Province is a matter coming exclusively within the powers of the Local Legislature, and any legislation on the subject by the Dominion would be *ultra vires*. All that the Legislature has done in the case of the present company is to enable it, in its corporate capacity, to carry on the business of insurance, but the Local Legislature has the exclusive discretion as to the restrictions under which it shall be carried on within the confines of the Province.

The point that policies were transactions coming within the words "trade and commerce," and so within the exclusive jurisdiction of the Dominion Parliament, was not taken in the reasons of appeal, nor I believe pressed on the argument, and would appear to be clearly untenable.

I am of opinion, therefore, that the appeal should be dismissed, with costs.

SPRAGGE, C.—I incline to agree, contrary, I confess, to my first impression, that the policy in this case must be regarded as a policy without any express conditions. I say this, understanding that the case is before this Court, upon the footing that the pleadings may be amended, setting up the defence that the policy was not subject to any express conditions.

It is not necessary to consider what other defences might have been open to the defendants if they had pleaded them. I desire only not to be taken as assuming that, in the absence of express conditions, an insurance company can have no defence—that the assured, upon proving the policy and the loss, must necessarily recover.

I apprehend that such is not the law; but that without any express conditions, the insurer may shew such misrepresentation or concealment as, without amounting to

moral fraud, would amount to legal fraud and vitiate the contract.

There is usually a series of questions accompanying the application for insurance. The answers to these questions are represented to the insurers, and if untrue, so as to mislead the insurers as to the risk they are asked to undertake, such answers would, I apprehend, vitiate the contract of insurance. Indeed, whatever form or shape such misrepresentation or concealment might take, the consequence would be the same.

Such being the case, the insurer is by no means helpless, even in the absence of express conditions; he is merely remitted to the general rule of law applying to other contracts. No such defence is set up here, so that we have only to deal with a contract without any conditions expressed, and as to which no defence of fraud is set up.

MOSS, C. J. A., and MORRISON, J. A., concurred.

Appeal dismissed.

PARSONS V. THE QUEEN INSURANCE COMPANY.

Insurance—Statutory conditions—R. S. O., ch. 162.

The action was brought on an interim receipt for insurance against fire issued by the defendants after the passing of R. S. O., ch. 162, which stated that the plaintiff was insured subject to all the covenants and conditions of the Company. No conditions were on the interim receipt.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 271, that whether the receipt was to be treated as a contract *in fieri* forming the equitable foundation for the issue of a policy, or as a concluded contract R. S. O., ch. 162 applied, and that the plaintiffs could not therefore resort to their own special conditions for the purpose of defeating the claim, or to the statutory conditions.

Held, also, that the fact that the defendants were a company formed under an Imperial Act was immaterial, as under the B. N. A. Act the Local Legislature has power to prescribe the terms upon which insurance companies, either foreign or domestic, shall carry on business within the limits of the Province.

The power to legislate upon the subject of insurance is not vested in the Dominion Parliament by virtue of its power to pass laws for the regulation of "Trade and Commerce" under the 91st section of the B. N. A. Act, but belongs to the Local Legislature.

This was an appeal from a judgment of the Court of Queen's Bench, discharging a rule *nisi* to set aside the verdict for the plaintiff and enter a nonsuit or verdict for the defendants, reported 43 U. C. R. 271. The pleadings and facts are stated there, and in the judgments on this appeal.

The case was argued on the 4th February, 1879 (*a*).

C. Robinson, Q. C. (with him *J. T. Small.*) The Act R. S. O. c. 162, does not apply to this contract, because this action is brought upon an interim receipt, and the statute only refers in words to policies. The conditions to be taken as part of the contract are the appellants' ordinary conditions, and it being admitted by the respondent that he had more than ten pounds of gunpowder on the premises, we were entitled to succeed on the eighth plea: *Geraldi* v *Provincial Insurance Company*, 29 C. P. 321. The evidence shews that the appellants were never notified of the prior insurances nor assented to them. It was *ultra*

(*a*) *Present.*—MOSS, C.J.A., SPRAGGE, C., BURTON, and MORRISON, JJ.A.

vires of the Local Legislature to enact R. S. O. c. 162, as the power to make laws in reference to insurance was in the Dominion Parliament. The case of *Paul* v. *Virginia*, 8 Wall, 168, which decides that insurance is not included in "Trade and Commerce," is not conclusive, inasmuch as the constitution of the United States differs from ours. In Canada all the powers not specifically conferred on the Local Legislature reside in the Dominion Parliament, while the converse is the case in the United States. But even the Dominion Parliament has no authority to affect the contract of a company doing business here under an Imperial charter, as in the case of the appellants. We were entitled to a nonsuit or to a verdict on the fourth plea, inasmuch as the respondent alleged in his declaration, as was the fact, that the delivery of the proofs of loss within fourteen days was a condition precedent to his recovering upon the contract between him and the company, but his own evidence shewed that he had failed to comply with the condition. They cited *Crosby* v. *Franklin Ins. Co.*, 5 Gray 504; *Billington* v. *Provincial Ins. Co.*, 2 App. R. 158; *Coulthard* v. *Royal Ins. Co.*, 39 U. C. R. 409; *Morrow* v. *Waterloo Ins. Co.*, 39 U. C. R. 441; *Davis* v. *Canada Farmers' Mutual Ins. Co.*, 39 U. C. R. 452; *Hawke* v. *Niagara District Mutual Ins. Co.*, 23. Gr. 140; *Smiles* v. *Belford*, 1 App. R. 436; *Routledge* v. *Low*, L. R. 3 H. L. 100.

M. McCarthy, for the respondent. The prior insurances were not upon the same property insured by the defendants, and even if either of them was on the same property, the defendants had notice of them and assented to them so that they might have been indorsed upon the policy to be issued on the interim receipt. The only condition applicable to the delivery of proofs of loss, was the statutory condition, and that was sufficiently complied with The Court below treated the declaration as amended, by striking out the statement of the condition precedent relied on by the defendants as to delivery of proofs of loss within fourteen days; but upon the evidence the defendants were

disentitled from insisting upon non-delivery of the proofs of loss within fourteen days, as an answer to the claim. The contract of insurance was complete. The only conditions to which it was subject were the statutory conditions mentioned in R. S. O. ch. 162, and insurance companies such as the defendants', carrying on business under an Imperial Charter, are, as to contracts of insurance entered into by them in Ontario, subject to such limitations and restrictions as to the form and terms of their contracts as the Legislature of Ontario have thought proper to impose.

22nd March, 1879. Moss, C. J. A., delivered the judgment of the Court.

I have already expressed generally my concurrence in the construction placed in *Parsons* v. *The Citizens Insurance Company*, reported *ante* p. 96, upon the Act to secure uniform conditions in policies of fire insurance. But the importance of the question induces me to attempt to indicate briefly the line of thought which led me to that conclusion.

I have carefully considered the judgment delivered by Mr. Justice Gwynne, in *Geraldi* v. *Provincial Insurance Co.*, 29 C. P. 321, and I trust that I have not overlooked any of the cogent arguments which he has advanced in support of his view that in the absence of variations in the prescribed manner, all policies are to be read against all persons alike, whether insurers or insured, as containing the statutory conditions alone, whether these are or are not in the instrument.

It may be that one reason why these arguments have not carried conviction to my mind is, that that learned Judge and I read the whole statute in a very different light. With the greatest respect for his opinion, I cannot think that the statutory conditions were devised and framed for the benefit of insurers, or in their interest alone. They stood in no need of protection. They had, during a

(a) *Present.*--Moss, C.J.A., Spragge, C., Burton and Morrison, JJ.A.

long series of years, succeeded in accumulating a mass of conditions, to which the ingenuity of the most experienced inspector could hope to make but a faint contribution. The mischief which the Legislature sought to remedy was that of innocent and honest insurers being entrapped by numerous and intricate conditions, the existence of which they did not suspect, or the sinister import of which they did not appreciate, until they sought to recover the indemnity for which they had paid their premium. The harsh and unrighteous defences which some companies were in the habit of making, upon the strength of their subtle conditions, were stigmatized as a blot upon the administration of justice, which the Legislature was invoked to remove. We are not, I think, at liberty to shut our eyes to the historical fact that it was in this spirit, and with this object, that the legislation was conceived.

When we examine the provisions of the statute, I am of opinion, that notwithstanding the criticisms we have heard upon its want of accuracy and precision, its whole scope is to protect the insured, and to throw upon the insurer the full responsibility of neglecting its directions. As Mr. Justice Gwynne has pointed out, the first duty which the statute enjoins is for the insurer to print upon the policy the statutory conditions. If he chooses to disregard this plain and positive mandate, the conditions shall, *as against him*, be deemed to be part of the policy. To my mind this plainly means that the insured has, if he chooses, the right to insist that the conditions shall be regarded as endorsed. But to say that they are to be deemed to be there for all purposes and under all circumstances, as against the insured and the insurer alike, seems to me to erase from the enactment the words "as against the insurers." It is putting the insurer in precisely the same position as if he had obeyed the statute and printed the conditions. If we read the Act as impliedly incorporating the uniform conditions into every policy, except where it is varied in the prescribed manner, we must hold that the construction would be just the same if the words had been "as against the insured,"

instead of "as against the insurers"—a conclusion which I apprehend a Court would be slow to adopt. It would, moreover, deprive the insured of the benefit of any relaxation of the statutory conditions for which he might in his own interest have stipulated, and to which the company might have agreed, simply because the company had disregarded the requirements of the statute.

But whatever may be the stringency of this enactment, it does not prohibit the insurer from exacting any just and reasonable conditions, for it goes on to provide that if he desires to vary the statutory conditions, or to omit any of them, or to add new conditions, there shall be *added* in conspicuous type and in ink of different colour, words to the following effect: "Variations in conditions. This policy is issued on the *above* statutory conditions, with the following variations and additions." The whole tenor of this provision, and notably the use of the words "added" and "above," restrict this mode of varying the effect of the statutory conditions to cases where they are printed upon the policy. The variations are to be made with a distinct reference to the printed statutory conditions. Then the next clause provides that "no such variation, addition, or omission, shall, unless the same is distinctly indicated and set forth *in the manner or to the effect* aforesaid, be legal and binding on the insured." That, it seems to me, entitles the insured to repudiate any special condition, unless it be made with reference to the printed conditions. This is the only manner which the statute has prescribed, and no other complies with its terms. Unless the statutory conditions are printed upon the policy, it is simply impossible to indicate variations in the manner or to the effect aforeaforesaid. It follows, that unless the company chooses to print the statutory conditions upon the policy, any attempt to introduce a special condition is futile against the insured; and if the statutory conditions are printed, equally so, unless his attention is directed to the change in the prescribed manner. The result then is, that unless the statutory conditions are printed, even they can be invoked

only by the insured, and there can be no variation of them, or addition to them, against his will. In other words, he can say: I am not bound by the statutory conditions because they are not actually there, and in their absence they are to be deemed part of the policy only as against the insurer, not as against me, and I am not bound by any special conditions because they are variations which are not indicated in the manner required by the statute.

The wording of the second section seems to have given rise to much difficulty on the part of the Judges whose duty it has been to pronounce upon its full effect—a difficulty from which I have not succeeded in wholly freeing my own mind. But I think that it is much diminished, when it is perceived that the case which the Legislature has most directly in view is that of variations being attempted without the use of conspicuous type, and not in ink of different colour.

I confess that I had the impression that the true construction of the statute might be, that when its requirements were not complied with, the insured had an option between a statutory condition and any unauthorized special condition upon the same subject. There are, no doubt, objections to this view, and as it does not appear to have been urged by any of the able counsel who have argued upon the statute in different cases, or to have been adopted by any of the Judges, I presume it is untenable.

It is, however, argued that the statute in question does not extend to the defendants, who are a company formed under the Imperial Joint Stock Companies' Act, (7 & 8 Vic. ch. 110.) This argument was divided into two branches: first, that the authority to pass such a law resides in the Dominion Parliament; and, secondly, that even the Act of that body could not affect a company so formed. With regard to the first branch, I simply desire to add to what was said in the case of *Parsons* v. *The Citizens Ins. Co.*, reported *ante* p. 96, that the contention that the Dominion Parliament is alone invested with jurisdiction to deal with this subject by virtue of its possessing exclusive legislative

authority for the regulation of trade and commerce, cannot be sustained. The reasoning of the Supreme Court of the United States upon an analogous case seems to be simply unanswerable. In *Paul* v. *Virginia*, 8 Wall. 168, the question arose upon the power of the State of Virginia to provide that no insurance company not incorporated under the laws of the State should have power to carry on business within the State without a license and a deposit. As Congress is invested with the power to regulate commerce with foreign nations and among the several States, it was contended by the plaintiff, who was the representative of a company incorporated in another State, that the Act was unconstitutional. Field, J., who delivered the considered judgment of the Court, said, at p. 183: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire entered into between the corporations and the assured for a consideration paid by the latter." Elsewhere in the judgment he used the following language, which is sufficiently apposite to the whole ground of defence we are now considering to warrant its citation. Speaking of a corporation created by the laws of any State, he says, at p. 181: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, a comity which is never extended when the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. * * They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest." This is the language of a tribunal, whose high authority upon such questions is universally recognized. Hence it appears that the power to legislate upon the terms on which insurance companies shall be permitted to deal with their customers in this Province belongs to that body which has authority to regulate the incidents of contracts within the Province, and that body

beyond dispute is the Local Legislature. Under its power to regulate the legal incidents of contracts to be enforced within its Courts, it can prescribe the terms upon which corporations, either foreign or domestic, shall be permitted to transact insurance business within the limits of the Province, and to such regulations all insurers engaging in business here render themselves liable before the Provincial tribunals. There may be inconveniences attendant upon the possession by the separate Provinces of power to make totally diverse conditions, and it may tend to impede or prevent the transaction of business by the largest and most desirable companies of non-provincial origin; but such considerations cannot affect the present question, which simply is, upon which Legislature, the Dominion or the Provincial, has the British North America Act conferred the power to deal with insurance contracts.

That this is a company formed under the Imperial Act is wholly immaterial. The Provincial enactment does not interfere in the least degree with Imperial legislation. The Joint Stock Companies' Act only authorizes the formation and incorporation of companies for the purpose of carrying on certain kinds of trade or business, upon the execution of a deed of partnership and registration. This deed usually specifies the powers to be exercised by the company, and it is said that in the case of the present defendants, power is inserted to carry on business in foreign countries or the colonies, and to enter into contracts of insurance upon such terms as may be agreed upon. But a little consideration is sufficient to shew that this is no more than a formal statement of powers necessarily incident to the existence of such a company. The Imperial Act does not profess to give to companies incorporated thereunder any special rights in derogation of the powers and privileges accorded to colonies.

It is argued in the next place, on behalf of the defendants that this case is unaffected by the Uniform Conditions Act, because the plaintiff does not claim under a policy, but under an interim receipt issued by an agent. By this

instrument it is declared that the property is held assured under the usual terms and conditions of the company until the policy is delivered, or notice given that the proposal is declined by the Company. The loss happened before the policy was delivered or notice given. The Court of Queen's Bench, in dealing with this question, proceeded upon the principle that if the plaintiff were seeking the aid of a Court of Equity to compel the delivery of a policy, the most favourable position that could be claimed by the defendants was that it should be made subject to the statutory conditions. I think there is no doubt that that is the utmost limit of the defendants' possible pretensions. Treating the case upon that footing, the Court was of opinion that the plaintiff was entitled to succeed. In the view we take of the case, it is unnecessary to say more than that even upon that assumption, as to the mode in which a Court of Equity would act, we see no reason for differing from the conclusion at which the Court arrived. But looking at the receipt itself, which the agent had full authority to give, we find that its real effect is to make a present and immediate insurance upon the property, subject to the usual conditions of the company. It was at the occurrence of the loss an existing contract, which bound the company as fully as a policy under seal, for the agent had just as much power to insure by such a receipt, for the period that must elapse before the board accepted or rejected the proposal, as the directors had to insure for the full period by a formal policy. The receipt, therefore, must be read as a contract of insurance between the plaintiff and the defendants, into which the latter have endeavoured to incorporate, by reference, their usual terms and conditions. In legal contemplation it does not differ from a policy not under seal, with such conditions printed upon it. If that be its character, it follows from the construction we have placed upon the Act, that the company cannot rely upon the alleged breach of the condition against prior insurances. Hence the plaintiff is equally entitled to succeed, whether the receipt is to be treated as a contract *in*

parts of the machine which he had concealed from the bailiff. The machine, which had been injured, was repaired at the plaintiff's expense. It was shewn that Ralph had had the use of the machine afterwards, but it appeared that he had used it with the plaintiff's permission.

On the 18th June, 1877, Ralph Hincks made a chattel mortgage of the machine to the defendant.

The learned County Court Judge Squier, before whom the case was tried, entered a verdict for the defendant. Subsequently a rule *nisi* to set aside the verdict was discharged, on the ground that there had been an abandonment of the seizure.

The plaintiff appealed.

The case was argued on the 5th of March, 1879 (*a*).

F. Osler (*Garrow* with him) for the appellant. The evidence shews a valid seizure, and sale thereunder: *Gladstone* v. *Padwick*, L. R. 6 Ex. 203; *Hayden* v. *Crawford*, 3 O. S. 583; *Walton* v. *Jarvis*, 14 U. C. R. 640; *Hamilton* v. *Bouek*, 5 O. S. 664. The question of abandonment is one of intention, and there was clearly no evidence of intention to abandon the goods in question here: *Gould* v. *White*, 4 O. S. 124. The presumption is in favour of the regularity of the bailiff's proceedings and nothing was shewn here to rebut this presumption: *Mitchell* v. *Greenwood*, 3 C. P. 465; *Boulton* v. *Fergusson*, 5 U. C. R. 515. But in any event the evidence establishes that Ralph Hincks waived the irregularities, if any: *Harley* v. *McManus*, 1 U. C. R. 141; *Tiffiny* v. *Miller*, 6 U. C. R. 426. Moreover Ralph Hincks is estopped by his conduct in connection with the sale to the plaintiff from disputing the plaintiff's title or asserting any title in himself to the machine: *Pickard* v. *Sears*, 6 A. & E. 369; *Gregg* v. *Wells*, 10 A. & E. 90.

C. Robinson, Q. C., for the respondent. The chattel in question was under the value of $60, and an article

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(*a*) *Present.*—Moss, C.J.A., Burton, Patterson, and Morrison, JJ.A.

by which Ralph Hincks obtained his living and, therefore was exempt from seizure: R. S. O. ch. 66, sec. 6; R. & J.'s Digest 1417. The plaintiff must claim through a valid sale: *Clarke* v. *Garrat*, 28 C. P, 75; the facts, however did not prove a valid seizure or anything approaching a seizure till the 23rd of June, when the execution had expired: *Culloden* v. *McDowell*, 17 U. C. R. 359; *Carroll* v. *Lunn*, 7 C. P. 510; *McIntyre* v. *Crysler*, 4 C. P. 248; *Atkinson* on Sheriffs, 192, 193. If, however, it is held that there was sufficient to constitute a valid seizure then we submit that the evidence shews that it was abandoned: *Craig* v. *Craig*, 7. P. R. 209; R. & J.'s Digest 1436-1455. If Ralph Hincks's conduct created any estoppel it is met by an estoppel on the part of the plaintiff, who allowed him to deal with the machine as his own; but there was no estoppel proved: *Lines* v. *Grange*, 12 U. C. R. 209.

March 22, 1879 (*a*). MOSS, C. J. A., delivered the judgment of the Court.

We think that what was done by the bailiff was sufficient to constitute a seizure. In considering what acts must be done to amount to an actual seizure, regard must be had to the circumstances. For example, in *Nash* v. *Dickenson*, L. R. 2 C. P. 252, it was held that the mere production of the warrant to the defendant upon his premises, and demand of the debt and costs without doing or saying anything more, was not a seizure. There it did not appear upon what he could well have levied, and he did not even profess to make a seizure. In *Balls* v. *Thick*, 9 Jur. 304, Lord Denman expressed the opinion that any act done by a person having authority which distinctly intimates to the party that he intends to execute the writ, is sufficient to constitute a seizure. That would seem to shew that much depends upon the nature of the chattels, their position and other surrounding circumstances. In the important case of

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Gladstone v. *Padwick*, L. R. 6 Ex. 202, it was said by Bramwell, B., to be clear that the sheriff need not lay his hand upon a single article. Here, part of the machine was in the premises of a person named Salkeld, and the bailiff marked that part with the word "seized." Another part was in the premises of the present plaintiff, with whom Ralph Hincks was then residing, and the bailiff went to it and told the parties that he seized it The roads were blocked with snow, and it was impossible for him to remove the machine at that time. He could not be expected to have slept in the open air himself and to have kept another man, in order to watch and keep physical control over these parts of a machine, which was scarcely worth $15.

In this connection, the remarks of Brayley, J., in *Swann* v. *The Earl of Falmouth*, 8 B. & C. 456, are very pertinent. There are authorities in our own Courts to the same effect, but it is not necessary to pursue that enquiry further for we collect from the observations of the learned Judge of the County Court that in his opinion there was a seizure, but that there was an abandonment. As that is generally a question of fact, we would not readily dissent from the conclusion of the learned Judge. But it appears to us to be open to serious question. There certainly was no intention by the bailiff to abandon, and it is equally certain that the execution debtor did not suppose that there was in abandonment, for the bailiff was permitted to remove the machine without objection or remonstrance.

The subsequent conduct of the execution debtor, to which we shall have occasion presently to direct attention, shews conclusively that he supposed the seizure to be continued. The case seems to closely resemble that which was present to the mind of Lord Denman, when he suggested in *Balls* v. *Thick*, 9 Jur. 304, that there ought not to be an abandonment if the position of the parties was not altered, and the defendant had full notice that it was to be considered a seizure, and not claim the chattel. But even if Ralph Hincks had the right to insist that there had been an

abandonment, he seems to have waived it in the most distinct manner. He knew the sale was about to take place, and instead of objecting to it, he requested his father to attend and purchase. With this request his father did not comply, and accordingly Salkeld became the purchaser. It is no strained conjecture from what the evidence discloses of their previous and subsequent dealings, that this was done with the full privity of Ralph Hincks. Then the plaintiff is urged by Ralph to buy from Salkeld, and as an inducement, Ralph offers him certain parts of the machine which he concealed from the bailiff, confessedly with the object of rendering it useless and valueless. His father then consents, and the machine is bought.

The object which Ralph had in view was no doubt that he might, through his father's bounty, enjoy the use of the machine, when it was repaired and fitted for work; but it is clear that this was all the advantage he expected, for he was then embarrassed, and had no idea of becoming the owner. The machine was repaired at the plaintiff's expense, Ralph not only being cognizant of this, but assisting in the work. After all this he could never be heard in a court of justice, to urge that Salkeld did not acquire a good title at the bailiff's sale, and transfer such a title to his father. If he still had any interest in the chattel, he constituted Salkeld his agent, to transfer it to the plaintiff, and the transfer was completed by the delivery of possession. He was not simply estopped from denying his father's title, but he had empowered Salkeld to transfer to him an absolute title. The circumstance that he was afterwards permitted by his father to use the machine, and enjoy its full benefit, does not destroy that title, for there is nothing in the evidence upon which to ground an inference that this was in consequence of any gift of the machine itself. Upon these facts it requires no argument to establish that nothing passed to Sowerby by his chattel mortgage. We think, therefore, that the plaintiff was entitled to succeed, and that the appeal must be allowed; with costs, and the rule *nisi* in the Court below made absolute

to enter a verdict for the plaintiff. We do not know what opinion the learned Judge formed with regard to the actual value of the machine at the time the defendant took it out of the plaintiff's possession, but upon that will depend the plaintiff's right to recover his full costs of suit.

Appeal allowed.

SAMIS V. IRELAND.

Judgment recovered for mortgage debt—Sale of equity of redemption and legal estate together—R. S. O. ch. 66, sec. 35—Purchase by judgment creditor.

S., at the time of his death, owned a farm of 98 acres, 25 of which he had mortgaged. After his death his mortgagee recovered against his executor two judgments, viz., one in the County Court for the mortgage debt, and one in the Division Court for a debt not due by S. in his lifetime, and for which, therefore, his lands were not liable to be sold. The judgment plaintiff, having transferred his Division Court judgment to the County Court, issued executions on both judgments, under which the sheriff offered for sale the interest of S., the testator, in the 98 acres. The judgment plaintiff became the purchaser, bidding just enough to cover the amount of his two judgments and the costs, but not paying or intending to pay any money except the amount of the sheriff's fees.

Held, that by a sale of the testator's interest in the 98 acres, the equity of redemption in the 25 acres would have passed along with the legal estate in the 73 acres, under R. S. O. ch. 66 s. 35: but that no real sale had taken place, and therefore the sheriff's deed, made to the judgment plaintiff in pursuance of his bid, was void.

In the County Court suit the summons was addressed to W. M. Platt, executor of the last will and testament of S., deceased. The particulars of claim were for $200, on a mortgage made by S. in his lifetime, &c., and the judgment was that P. do recover against the said W. M. Platt, executor.

Held, that the fact that the summons was not addressed to Platt *as* executor, and the judgment was not expressed to be against him as executor, did not make this a judgment against him personally, and that it was sufficient to warrant an execution against the lands of the deceased.

Brown v. *Bacon*, 16 Gr. 472, and *Wood* v. *Wood*, *Ib.* 471, questioned.

Per PATTERSON, J.A.—If the sale could not have been upheld under the statute because of the legal and equitable estate being sold together, yet the sale might be upheld as to the legal estate.

Per MOSS, C.J.A.—In such a case the sale could not be upheld in part but was void *in toto*.

THIS was an appeal from the judgment of the Common Pleas, discharging a rule *nisi* to set aside a verdict for the

plaintiff, and to enter a verdict for the defendants, reported 28 C. P. 478. The facts are stated there, and in the judgments on this appeal.

The case was argued on the 15th of November, 1878 (*a*).

J. K. Kerr, Q. C., and *Boyd*, Q. C., for the appellants. The evidence shows that there was a valid sale of the land in question, and that it was duly conveyed to the defendant Ireland. Although a tenant cannot dispute a landlord's title, it is well settled that he is at liberty to prove the determination of his landlord's title. This was proved in the present case as well as the sale of the land to Powers, his becoming a tenant to Powers and his purchase of the land from him, which was shewn to have been in good faith. Being a purchaser for value, without notice and under a registered title, he is not affected by any defects in Powers's title, arising from the sale of the equity of redemption and freehold together. At any rate he is entitled to a lien for improvements made in the belief that there was a good sale. But the sale was clearly good, as there is nothing in the statute to prevent the sale of the equity of redemption and the freehold together: *Vannorman* v. *McCarty*, 20 C. P. 42; *Chisholm* v. *Sheldon*, 1 Gr. 108, and 2 Gr. 178. In any event, however, the sheriff's deed conveyed the seventy-five acres, even if it was not operative as to the residue of the lot: *Pegge* v. *Metcalfe*, 5 Gr. 628.

Bethune, Q. C., (*J. W. Kerr* with him,) for the respondents. There was no such mistake as to the title as to give the defendant Ireland any lien for improvements, as he knew the state of the title, or could have known it by inquiry, which it must be assumed he made. The claim cannot be set up here as it was not advanced at the trial or in the Court below. The defendants were estopped by the lease made to Ireland, on the expiration of which he was bound to deliver up possession to the plaintiffs: *Fox* v. *Macaulay*, 12 C. P. 298; *Tiffany* v. *Miller*, 5 U. C. R. 426:

(*a*) *Present.*—Moss, C. J. A., Burton, Patterson, and Morrison, JJ. A.

Kyle v. *Stocks*, 31 U. C. R. 47. It is attempted here to support the sale under the Division Court execution, but it was admitted to be void in the Court below, and is clearly bad, as the judgment on which it issued could not bind the testator's estate. Nor can the sale be supported under the County Court execution. The judgment in that case was against Platt personally, not as executor, and could not support an execution against the testator's estate. The sheriff had no power to sell the equity of redemption and freehold together. It cannot be held that the deed operated as a conveyance of the seventy-five acres, as the sale was either wholly void, or only good as to the equity of redemption in the twenty-five acres: *Heward* v. *Wolfenden*, 14 Gr. 188; *Re Keenan*, 3 Chy, Ch. 285; *Fitzgibbon* v. *Duggan*, 11 Gr. 188; *VanNorman* v. *McCarty*, 20 C. P. 42; *Ferguson* v. *Ferguson*, 16 Gr. 309; *Hilliard* on Mortgages, vol. 1, p. 405, sec. 39.

March 22, 1879. MOSS, C. J. A. (*a*)—In the report of the judgment delivered in the Court of Common Pleas, it is stated that it was admitted in the argument that the sale under one of the executions could not be supported, referring to that issued out of the County Court upon the transcript of the judgment recovered in the Division Court. Upon the hearing of this appeal, however, it was sought to withdraw this concession, but we do not think that the attempt to prove the validity of the writ was attended with any success. The judgment was recovered in the Division Court on the 22nd May, 1868, by Powers against Platt, described as "executor to the estate of the late Ebenezer Samis." The testator had died in April, 1856, and probate was granted to Platt on 6th November, 1867. The particulars of the plaintiff's claim were for cash paid on 15th December, 1866, and 25th July, 1867, for taxes on land belonging to the estate, and under date of November, 1867, "cash paid for executors in and for expenses

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

taking out letters of administration under the will of Samis," and commissioner's fees on affidavits. We are of opinion that the position that a judgment could be recovered upon these loans to bind the estate is wholly untenable. The testator had died more than ten years before; the payments for taxes were made before a personal representative had been appointed, and beyond all question were made by Powers in his character of mortgagee of the twenty-five acres; and the advance made to enable Platt to obtain probate did not create a debt for which a judgment could be recovered against the executor in his representative capacity. Upon its face the judgment, if it purports to bind the estate, is absolutely void, and the execution was therefore a simple nullity. It would seem, however, from the tenor of the judgment, and from the execution against goods delivered to the bailiff, upon the return of which the transcript was obtained, to be by no means certain that in the Division Court the demand was not treated as a personal one against Platt. In any point of view it is impossible that a valid sale of the testator's realty could be made under the execution issued upon the transcript.

The appellant is, therefore, forced to rely upon the sale under the execution issued upon the judgment of the County Court. That judgment was recovered on the 25th of January, 1868, against the executor for the amount of principal and interest upon a mortgage in fee of the north twenty-five acres of the west half of lot 17 in the 5th concession of Percy, made to Powers by the testator. At the time of his death the testator was the owner of the equity of redemption in these twenty-five acres, and was absolutely seized in fee simple of the remainder of the west half, except two acres which had been previously sold. Under the executions at the suit of Powers the sheriff advertised for sale all the estate, right, title, and interest, which were of Samis at the time of his death, in the hands of Platt, the executor, to be administered. At the sale Powers became the purchaser of the interest thus

advertised, for the amount of the two judgments and fees, and on the 10th December, 1869, received a deed from the sheriff, which, after reciting the seizure and taking into execution of the said west half, except the two acres, purports to grant all the estate, right, title and interest, which were of Samis at the time of his death in the premises. All that Powers really did was to say to the sheriff that if the premises were knocked down to him he would discharge the executions and pay the sheriff's fees. It is to be observed that at the time of the seizure and sale by the sheriff there were two distinct and separate interests, each liable to be sold under different statutes for the satisfaction of the testator's debts. These were the equity of redemption in the twenty-five acres, and the fee simple in the 73 acres. Now, it has been held in several cases that the statute authorizing the sale of an equity of redemption must receive a very limited operation, and is only applicable to the case of a simple equity arising upon a single mortgage of the premises, or at most existing between one mortgagor and one mortgagee. The first case in which the comparatively narrow scope of the statute was pointed out and acted upon was *Heward* v. *Wolfenden*, 14 Gr. 691, where the late Chancellor VanKoughnet held that a sale of one of several lots which were included in a single mortgage was unauthorized. The precise point decided was, that the sheriff must sell the equity of redemption in all the lands comprised in the mortgage, or not sell at all. In the case of *Van Norman* v. *McCarty*, 20 C. P. 42, this construction of the statute was adopted by the Court of Common Pleas under similar circumstances, and Mr. Justice Gwynne indicated some of the difficulties which may attend upon a purchase of an equity of redemption by the mortgagee under an execution issued upon a judgment for the mortgage debt. The operation of the statute was still further narrowed by the decision of the Chancellor in *Donovan* v. *Bacon*, 16 Gr. 472, where it was held that a valid sale could not be made where there were two mortgages held by different persons upon

the property. It may be that there would not be so much difficulty in working out the respective rights of the parties, as the learned Judge apprehended, and I think it must be conceded that the words of the statute, when liberally interpreted, are wide enough to authorize such a sale; but the decision seems to point to a judicial leaning toward confining the operation of the enactment within narrow boundaries. Looking at the spirit of these decisions, and the reasons of policy suggested for confining the scope of the statute to its strict terms, I was inclined to think that there was much weight in the contention that, consistently with them, it could not be held that the equity of redemption and the legal freehold could validly be sold in one parcel. These considerations seemed still stronger when applied to the case of a mortgagee purchasing under a judgment recovered by himself for his mortgage debt. It is clearly shewn by the learned Judges in the Court below that where the mortgagee, being the execution creditor, offers a certain price for the interest of the execution debtor in the mortgaged premises, the mortgage is thereby discharged, and the price bid (at least after deducting costs) belongs to the mortgagor. I have felt grave doubts whether that result is not sufficient to shew that the statute did not contemplate a purchase by the mortgagee of the equity of redemption, and of another property, in one parcel. If the sale of the two jointly could not be maintained, I could not see my way clearly to accepting the view that at any rate it was good as to the seventy-three acres. There were two assets of the testator, each of which was saleable under an execution, but which upon the present hypotheses were not saleable together. The sheriff offers the two as one unit, and the creditor bids one price for them jointly. There is no separation of, or mode of separating, the price into two sums, one of which shall be applicable to each asset. When the purchaser says he wishes to take the freehold at the price he bid, I do not at present perceive why the debtor has not an equal right to say that he must take the equity of redemption at that

price, or relinquish his purchase. I do not think that this view is met by pointing out that if before the statute the sheriff had offered the interest of an execution debtor in one hundred acres, twenty-five of which he had previously mortgaged, the remaining seventy-five would have passed. No doubt that would have been the result, but why? Because there was no exigible interest in the twenty-five acres, and the operative effect of the writ was precisely the same as if the debtor had absolutely conveyed that parcel to a stranger. There was only one interest capable of sale, and to it the whole bid would properly be attributable. But here there was an exigible interest in the twenty-five acres, and when the sheriff seized all the estate and interest of the debtor in the 100 acres, he seized it as well as the fee simple in the residue. When he sold, he purported to sell the one as well as the other. He had as much authority under the existing law to dispose of and realize from the equitable as from the legal interest; and if the law did not permit the two to be sold together, I have not been able to satisfy myself that there would be any reason for one passing rather than the other.

But upon a renewed consideration of the decisions, I cannot find that there is anything in the principles upon which they proceed prohibitory of a sale of the equitable and legal estate in one parcel. There were not two mortgages, and so the doctrine laid down in *Donovan* v. *Bacon*, 16 Gr. 472, is inapplicable. The whole equity of redemption, and not a part, was offered for sale, and so the case is not obnoxious to the objection which prevailed in *Heward* v. *Wolfenden*, 14 Gr. 188. The essence of the sheriff's proceeding was that he exposed for sale the absolute property in the 98 acres, subject to the liability of paying off the mortgage and saving the mortgagor from being sued upon his covenant.

Passing from the decisions to the statute itself, I find myself obliged to hold that its language is wide and general enough to fully authorize such a sale. The 257th sec. of the Common Law Procedure Act empowered the sheriff

to seize, sell and convey in like manner as any other real estate might be seized, sold and conveyed, all the interest of a mortgagor. As this was held not to extend to the case of an execution issued upon a judgment recovered against the executor or administrator of a mortgagor, it was provided by the 27 Vic. ch. 13, that the equity of redemption should be saleable under an execution against the lands of the owner in his lifetime, or in the hands of his executors or administrators, in the same manner as any lands could be sold at law. Applying this very comprehensive enactment to the present case, it would seem to render the interest in the 25 acres just as saleable along with the 73 acres as any two adjoining freehold properties, forming in fact one estate, but acquired by the owner under different grants. If the legislation had stopped here, the best opinion I can form is, that it would have enabled any ordinary purchaser to acquire the whole interest which the deceased had in the 98 acres, and which he might himself have conveyed during his lifetime. Then by sec 259 the mortgagee, even if plaintiff in the judgment whereon the writ is issued, receives an express right to become the purchaser, and to acquire the same estate, interest, and rights thereby as any other purchaser, but he is to give the mortgagor a release of the mortgage debt. The result is that whereas if a stranger becomes purchaser, he must pay the sheriff the amount of his bid and indemnify the mortgagor, the mortgagee purchasing must pay the amount after deducting costs and any claim independent of the mortgage debt included in the judgment, and must discharge his mortgage.

If, then, this case simply were that Powers having recovered a judgment for his mortgage debt and costs, had offered, as a stranger would offer. to pay $551 for the testator's interest in the 98 acres, I do not think that the sale could have been avoided merely by force of the statute. But this was by no means what actually took place. He had directed the sheriff to sell not only under the execution which bound the interest of the deceased, but under an

execution which was wholly inoperative against these lands. He did not propose to the sheriff, nor did that officer understand him as offering, to take the 98 acres in consideration of his discharging the mortgage and paying for the benefit of the heirs the balance of the $551, after deducting costs. His offer was not to pay money, except the sheriff's fees, but to accept the equity of redemption and the freehold for the amount of the two writs. This was an offer which the sheriff had no authority to accept as equivalent to a bid of $551, and in my opinion there was no real purchase or sale. Unless there was a sale, it is quite clear that the sheriff had no power to convey. If the sheriff had before the execution of the conveyance discovered what the law was, he would certainly not have given his deed, nor do I think he could have compelled Powers to accept a conveyance and pay $551, because that was not what he had contracted to do. On this ground I think that Powers acquired no title by the sheriff's deed. It is impossible to feel any regret in arriving at this conclusion. I entertain no doubt that the purchase by Powers could never have stood in a Court of equity. It is only necessary to point out that by the expenditure of the small amount of costs properly recoverable under his County Court judgment, he succeeded not only in foreclosing the equity of redemption, but in acquiring the remaining 73 acres of the farm.

If it would not have given him a defence in an action of ejectment, Ireland seems to be in no better position. He entered into possession as tenant to the plaintiffs. Before he can be heard to refuse restoration of possession, he must shew that his landlord's title has expired or been extinguished. For the purposes of this action he is in no higher position than if he were in as tenant for years under Powers. As Powers's title has failed, the plaintiffs' has not been thereby defeated, and the defendant cannot resist this action. If his purchase has conferred upon him any enforceable rights, they must be enforced after he has given his landlords any advantage that may be desirable from their being restored to possession.

In the reasons of appeal the Court is asked, in the event of upholding the judgment, to award compensation. There are no materials before us upon which we can properly form a decision upon this question, and our judgment does not in any degree affect the right of the defendant to institute proper proceedings for the enforcement of any lien that may be given to him by the statute.

For these reasons, I am of opinion that the judgment of the Court below ought to be sustained and the appeal dismissed, with costs.

PATTERSON, J.A.—This was an action of ejectment for the west half of lot 17 in the fifth concession of Percy, excepting thereout two acres on the south-west corner and the north 25 acres.

The claim is thus for 73 acres.

The defendant Ireland had been tenant to the plaintiffs, and is therefore estopped from denying the title under which he entered.

He asserts, however, that the land was sold under a *fi. fa.* against the executor of the plaintiffs' ancestor, and now claims to hold under the purchaser at that sale.

Ebenezer Samis, the ancestor, had mortgaged to one Power, the north 25 acres which are excepted from the claim in this action, to secure $200. After the death of Ebenezer, Power recovered a judgment in the County Court against the executor for the $200 and interest. Passing over, for the present, the objections to this judgmet as not being *de bonis testatoris*, and assuming that it would support a sale of the lands of the testator, let us consider the sale which was in fact made under it.

The sheriff offered for sale the right title and interest which were of Ebenezer Samis at the time of his death in the west half of lot 17, excepting the two acres at the south-west corner—thus including the 25 on which Powers held the mortgage, and the 73 acres which are the subject of this action.

Powers, the execution plaintiff, became the purchaser at

the sum of $551, that being the exact amount required to pay this execution and another which he had issued upon a Division Court judgment against the executor transferred to the County Court, together with sheriff's fees and costs of executions.

It is contended that the law which makes an equity of redemption saleable under a *fi. fa.* does not permit a sale of that interest along with another property: and that this sale must be held void because the only interest in the 25 acres was the equity of redemption, while the legal estate in the parcel of 73 acres was what was sold.

The contest before us relates to the latter parcel only; and the defendant succeeds if he can maintain the validity of the sale of that parcel; even though the sheriff's deed should be held to be inoperative as to the equity of redemption in the 25 acres. It will be useful, however, to examine the law as affecting the whole property.

Until 1849 an equity of redemption could not be sold under a common law process: *Simpson* v. *Smyth*, 1 E. & A. 9. In that year the Act was passed (12 Vict. c. 73) which, with the Amending Act, of 1863 (27 Vict. c. 13) may now be found consolidated in secs. 35, 36, 37 and 38 of the R. S. O. ch. 66.

The enactment directly conferring the power to sell in a case like that in which the sale now in question was made is in these words: "The equity of redemption in any freehold mortgage of real estate shall be saleable under an execution against the lands and tenements of the owner of such equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to such mortgage, in the same manner as any lands and tenements can now be sold under an execution at law." These words are from the Act of 1863. Those used in the Act of 1849 were equally wide and general, authorizing the seizure, sale and conveyance, in like manner as any other real estate might be seized or taken in execution, sold and conveyed, of all the legal and equitable interest of the mortgagor in the mortgaged lands and tenements.

In applying the statutes, however, to the circumstances of actual sales made under writs of execution, it became important to consider how far these general terms must be treated as modified by other provisions and by the necessity for evading the difficulties incident to attempting, without the aid of the procedure and machinery of a court of equity, to give effect to a sale of the equity of redemption when other interests than those of the immediate parties to the mortgage might be involved or where there were more mortgages than one.

The other provisions of the statute are those now contained in secs. 36 and 37 of R. S. O. ch. 66, which are the same as secs. 258 and 259 of Consol. Stat. U. C. ch. 22.

Sec. 36, declares that the effect of the "seizure or taking in execution, sale, and conveyance of any such mortgaged lands and tenements shall be to vest in the purchaser, his heirs and assigns, all the legal and equitable interest of the mortgagor therein at the time the writ was placed in the hands of the sheriff, * * as well as at the time of such sale, and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if such sale had not taken place; and the purchaser, his heirs or assigns, may pay, remove, or satisfy any mortgage charge or lien which at the time of such sale existed upon the lands or tenements so sold, in like manner as the mortgagor might have done, and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right, and title as the mortgagor would have acquired in case the payment, &c., had been effected by the mortgagor"; and it makes further provision for execution and registration of a discharge of mortgage.

Section 37 enacts that any mortgagee of lands so sold, or his heirs and assigns (being or not being plaintiff or defendant in the judgment whereon the writ of *fi. fa.* under which the sale takes place has issued,) may be the purchaser at such sale, and shall acquire the same estate, interest, and rights thereby as any other purchaser; but in the event of the mortgagee becoming such purchaser he

shall give to the mortgagor a release of the mortgage debt; and if any other person becomes such purchaser, and if the mortgagee enforces payment of the mortgage debt against the mortgagor, then such purchaser shall repay the amount of such debt and interest to the mortgagor; and in default of payment thereof within one month after demand, the mortgagor may recover from such purchaser the amount of such debt and interest in an action for money had and received, and until such debt and interest have been repaid to the mortgagor he shall have a charge therefor upon the mortgaged lands.

In *Heward* v. *Wolfenden*, 14 Gr. 188, VanKoughnet, C., had to deal with the case of a sale of the equity of redemption in one of several lots mortgaged to secure the same debt. He remarked at p. 190 that it had been found necessary to give the Act a very limited effect in consequence of the difficulties of dealing by common law process with such an estate as an equity of redemption, involving, as it so often does, so many and varied interests, with which a Court of Equity can alone deal fairly and completely. And he stated that in his construction of the statute the sheriff must sell the equity of redemption in all the mortgaged lands or not sell at all; and that of course there could be no such sheriff's sale when the lands lay in different counties, and the Act then would not apply.

The learned Chancellor supported this view by reasoning and illustrations, both of which were enforced and amplified by Gwynne, J., in his judgment in *VanNorman* v. *McCarty*, 20 C. P. 42, a case presenting precisely similar facts, the sheriff having sold the equity of redemption in 40 acres, being part of a lot of 50 acres covered by the mortgage.

The conclusion arrived at in these cases seems to me beyond the reach of question, and it has, I believe, always been accepted as placing upon the statute a construction fairly warranted by its terms, and which makes it operative in a large class of cases, while it excludes others in which the redemption or discharge cannot be worked out in so simple a manner.

The same learned Chancellor decided the case of *Donovan* v. *Bacon*, 16 Gr. 472, which is reported in a note to the case of *Wood* v. *Wood*, 16 Gr. 471, in which latter case the decision was followed by Spragge, V. C. These cases presented a state of facts different from those before the Courts in *Heward* v. *Wolfenden* and *VanNorman* v. *McCarty*. The sale by the sheriff was of the equity of redemption in one parcel of land only, and its validity was questioned only on the ground that there were two mortgages outstanding in the hands of different persons. The Chancellor expressly guarded himself from being understood to hold that the statute could not be applied where the same mortgagee held two mortgages instead of one; but he was of opinion that its application was excluded by the circumstance that the mortgages were in different hands. He said, at p. 473: "The language of the 258th section would be wide enough to cover such a sale; but read in connection with the 259th section, it seems to me that the Legislature were intending to deal with the simple case of one mortgagor and one mortgagee, and that they did not intend the equity of redemption to be sold when there was more than one mortgagee; for while they declare in this latter section that any mortgagee may purchase, they provide that he shall give to the mortgagor a release of the mortgage debt; whereas, if any other person becomes the purchaser he shall pay off the mortgage debt, or perhaps the mortgage debts, if the clause had reference to such a purchaser only. But it would be meting out scant justice to the mortgagor that where a mortgagee, if he become the purchaser, should alone be required to release his own debt—for he of course could not release debts charged on the estate due to others —yet that a stranger purchasing must pay off all the incumbrances, without saying that a mortgagee might not render himself liable to pay off the incumbrances (unless saved by the statute relating to tacking and mesne charges). Still, I think that these distinctive provisions of the statute to which I have just referred, in connection

with the language of those sections which operate only in the case of a single mortgage, indicate that the Legislature only intended to deal between mortgagor and the one and the same mortgagee; and this construction of the statute is in accordance with the views taken by the Court on other questions arising under it. I do not mean to say that where the same mortgagee holds two mortgages instead of one, that the statute could not be applied."

I have quoted this language in full in preference to giving the bare effect of the decision, because with the greatest respect for the authority of the eminent Judge by whom it was pronounced, I am unable to read the statute in the way he suggests. I do not take the direction of section 259 that the mortgagee, becoming the purchaser of the equity, shall give the mortgagor a release of the mortgage debt, to confine his liability under the section to the performance of that duty, if there happens to be another mortgage held by a stranger. A mortgagee, purchasing, must release his debt; any other person purchasing must protect the mortgagor from the mortgage debt. The mortgagee, purchasing, is "another person" than the mortgagee who holds the other mortgage. I see no difficulty whatever in applying to him both the provisions of the section, and requiring him to release his own debt and to protect the mortgagor from that secured by the other mortgage. There is nothing to require the machinery of a Court of Equity to work it out, and nothing that strikes my mind as opposing any obstacle to the simple operation of the general enactments of the preceding sections.

The decision, however, whether well founded or open to question, proceeds entirely upon considerations touching the rights of the mortgagor or person entitled to redeem as against the holders of the incumbrances upon the land.

This case was followed by Mr. Taylor, the Master, in *Re Keenan*, 3 Chy. Ch. 285.

In *Rathbun* v. *Cuthbertson*, 22 Gr. 465, Proudfoot, V. C., held that the principle laid down in *Donovan* v. *Bacon*, did not stand in the way of his maintaining the

validity of the sale which was brought in question before him. The execution in that case was against three defendants jointly. Each of them had given a mortgage upon land which belonged to himself and not to the others, being in each case one undivided eighth of an estate which had had come by devise or descent to them and their co-heirs or co-devisees. The sheriff sold the right, title, and equity of redemption of all the defendants in all the lands. The only remark necessary to make respecting this case, as pertinent to the question before us, is, that it does not restrict the operation of the statute within any narrower limits than those indicated by the former decisions.

We are asked to declare that the sale in this case is void by reason of its embracing the equity in part of the land and the legal estate in the rest.

If we hold the sale of the equity invalidated because the legal estate was sold with it, we must do so for reasons which are not disclosed upon the statute, and are not deducible from the decisions to which I have referred. We have here only one mortgagor and one mortgagee. The latter having purchased the equity of redemption, the release of his mortgage debt becomes a matter of the simplest character. If a stranger had been the purchaser, there would have been no complication of interests or rights to embarrass the application of all the provisions of the statute for the protection of the mortgagor. The operative words of the statute in section 257 as amended, or section 35 of R. S. ch. 66, are amply sufficient to embrace such a sale, and I perceive nothing in the other provisions of the statute, or in the principles applied to its construction in the decided cases, or in any considerations touching the practicability of fairly and conveniently and completely disposing of and adjusting all the rights and interests concerned, to make it proper to hold that those operative words are not entirely applicable to this case.

This conclusion as to the legal validity of the sale of an equity of redemption under the circumstances we have been considering is decisive of the whole case, so far as the sale is impeached as unauthorized by the statute.

But even if the proper conclusion had been that the equity of redemption could not have been sold along with the legal estate in the other part of the farm, it would by no means have necessarily followed that the sale of the latter was invalid.

Before the passing of the Act of 1849, and while an equity of redemption could not be sold under Common Law process, the sheriff might, with perfect regularity, have offered for sale and have sold and conveyed, in terms, exactly what was dealt with here, namely, the right, title, and interest of the debtor in the 98 acres of land. Under such a sale, there would, I apprehend, be no doubt that whatever legal freehold interest the debtor had would have passed, the purchaser would have got the seventy-threee acres and would have taken nothing in the twenty-five acres. If, while the statute makes an equity of redemption saleable in general, it did not make this one saleable under the particular circumstances, it seems to me that the effect must be just as if the statute had not passed, and that the title to the legal freehold would pass just as it would have done before 1849. The purchaser, knowing that the execution debtor had an interest in the whole 98 acres, and bidding with the idea that he was purchasing the whole of that interest, might possibly have just ground for asking to be relieved from his bid when it turned out that he was to get only the interest in the 73 acres, but if he was content to take that interest and pay the price he had bid for the whole, I do not see why he could not legally do so.

It is scarcely necessary to say in holding that the statute, which makes the equity of redemption saleable, does not necessarily require it to be sold by itself, I throw no doubt upon the right or the propriety of proceedings to restrain a sale until the interest to be sold is ascertained, or to compel the sale of different properties separately when the interest of the parties concerned requires that to be done.

The observations I have so far made scarcely, if at all, touch the grounds upon which the judgments in the Court below proceeded. They have rather been addressed to the

arguments presented to us upon this appeal. I have given careful attention to those judgments, but without being able to adopt all the reasoning of the learned Judges by whom they were delivered. There is no difference between us upon the effect of the purchase by the mortgagee of the equity of redemption. The price bid for it is of course an amount over and above the mortgage debt; and over and above other incumbrances, if, as in *Donovan* v. *Bacon*, 16 Gr. 472, there had been other incumbrances. It is the interest of the mortgagor that is sold. But it does not follow that because the *mortgage* is satisfied by the purchase of the equity, that therefore the *judgment* is satisfied, and that all the money bid belongs to the mortgagor. A judgment may include other debts besides the mortgage debt, or it may not include the mortgage debt at all. And when, as in this case, it may be for the mortgage debt alone it will usually have the addition of costs which must be satisfied. The fact that the execution creditor is the mortgagee, or even the further fact that the judgment has been recovered upon the covenant to pay the mortgage money, cannot be made the foundation of a rule of law that no other property can be sold along with the equity of redemption in the mortgaged lands. In some cases it might be detrimental to both mortgagor and mortgagee to sell the mortgaged land by itself; as for instance where it formed part of a farm or a homestead which would sell better in a block. But the expediency of selling one way or the other, is a matter apart from the legal right.

Mr. Justice Galt sums up the result of his examination of the law in these words, 28 C. P. 478, at p. 484: "If, as in the present case, the mortgagee is such creditor, and the debt is the mortgage debt, then upon his becoming the purchaser, the mortgage is satisfied, and any money bid by him would be payable, not in discharge of his judgment debt, but to the mortgagor. If this be so, it follows that no other distinct property belonging to the mortgagor, together with the equity of redemption, can be sold to the mortgagee on any judgment obtained by him for his mortgage debt."

This proposition seems to overlook the fact that the judgment is almost necessarily for more than the mortgage debt, and cannot therefore be accepted as correctly laying down a general rule, or as covering the ground on which the plaintiff, if entitled to succeed in this case, can successfully impeach the sale. Mr. Justice Gwynne refers to the exposition of his view of the law as given in *VanNorman* v. *McCarty*, with which I have already expressed my entire concurrence, but which, as I have attempted to shew, applies the law to a state of facts different from those before us. Referring to the undoubted fact that a mortgagee purchasing, bids whatever his purchase money is for the value of the estate in excess of the mortgage, he says, at p. 487: "In the case before us there is no alternative that I can see, but that the sale was either wholly void, and the mortgagee came into the position of a mortgagee in possession or else he has acquired the mortgaged premises released of all equity of redemption in consideration of the amount which he bid, and this latter was very far from his intention; but in either case the plaintiffs' title to the 75 acres was left untouched, and therefore they must recover in this action." Now, while I think the learned Judge in this passage indicates some circumstances which require to be carefully considered as objections to treating the transaction as a sale at all, I do not see my way to hold that by mere force of the statute the sale is void. If I am right in the opinion that nothing in the statute prevented the whole interest of the execution debtor in the whole 98 acres being sold as one parcel; the conclusion would be that the purchaser should have paid over to the sheriff the $551 which he bid, less the costs which formed part of his judgment; and the sheriff should have paid over the cash, less his own fees, to the heirs of the mortgagor. The consequence of upholding the sale would be that this money, if not paid over, is still due. It may be, and I have no doubt it is true, that the mortgagee never intended to buy on these terms; but testing the validity of the sale by the provisions of the statute alone, I take the result to be that if he acquired the land, he has to pay his bid.

Let us now consider the actual circumstances of the transaction. The sheriff had in his hands two writs of *fi. fa.*, and he professed to sell under both of them, and he recites both writs in his deed. One of these was founded upon a Division Court judgment obtained by the mortgagee against the executor personally, which had been transferred by transcript to the County Court. Beyond all question this writ afforded no support to the sale of these lands. The other writ was upon a judgment recovered in the County Court for the mortgage debt, being $332 and $18.50 costs. It has been urged in argument that this was also a judgment against the executor personally, but I do not think that contention well founded. It was obtained by default, for want of appearance. The summons is addressed to William M. Platt, executor of the last will and testament of Ebenezer Samis deceased. The particulars describe the claim as for $200 on a certain indenture of mortgage, bearing date, &c., made by Ebenezer Samis in his lifetime to the plaintiff, whereby he covenanted to pay the plaintiff the said sum of money and interest thereon, &c.: thus describing a cause of action for which the executor was not personally liable; and the judgment is that the said Jabez P. Powers do recover against the said William M. Platt, executor, &c.

The objection is, that the summons is not addressed to Platt "*as*" executor, and that the judgment is not expressed to be against him *as* executor.

The *fi. fa.* is unobjectionable in its form; and after as full an investigation as I have been able to give to the matter, I have not found any authority, or perceived any good reason for holding that it was not warranted by the judgment, or that the execution defendant, who did not object to it while current, could be allowed to treat the sale under it as void.

The real position then is, that the sheriff being entitled to sell for the mortgage debt of $332 and a year's interest on that sum at six per cent.; for $18.50 for costs with a year's interest on that sum; for $17, as endorsed in the

fi. fa., for writs of execution; and for his own fees, offers for sale the interest of the testator in the 98 acres of land. Professing, however, to sell, not for those sums only, but for the Division Court judgment also, making the whole amount to be realized $551. Powers having ascertained from the sheriff that that is what is required, bids the exact sum, and the sheriff makes him a deed. No money is paid to the sheriff except his own fees, the balance being accounted for by Powers giving the sheriff a receipt for $507.76, as paid to himself for the amount to which he claimed to be entitled upon the two writs of execution. If the sale had been made upon a proper understanding of the rights of the parties under the two executions and under the effect of the statute, Powers should have executed a release of the mortgage debt of $332 and interest, and should have paid over to the sheriff the $507.76, less his $18.50 of costs and the interest thereon, and less the $17 for writs. This was, as Mr. Justice Gwynne has truly remarked, very far from his intention.

The only evidence we have of what took place at the sale is, that of Mr. Benson, the deputy sheriff, and that of Powers himself. Mr. Benson had no recollection of what occurred. He was at the sale, but thought it was conducted by the sheriff, and he could not recollect that there was more than one bid. Powers also fails to remember that there was any bid but his own; and of his own he says: "I ascertained the amount from the sheriff to be levied, and I bid that amount."

It is not difficult to imagine how, even assuming that the advertisement of the sale had attracted persons willing to purchase, no one bid more than the $551, if the facts now shewn on the part of the defendant were known by the audience at the sheriff's sale. We are told that the value of the land was not over $800. It was subject to a mortgage of $332. A stranger purchasing for $551 would therefore necessarily pay $883 for the farm. The mortgagee Powers having the idea that he was at liberty to deduct the $332 from the $551, and to pay only the difference of

$219, with the further advantage of paying it to himself on his Division Court judgment, saw no need for hesitation in bidding the full amount. He supposed in fact that he was getting the $800 farm for $551, while to a stranger bidding that sum it would cost $883.

The bid of Powers, under these circumstances, was not, and cannot be regarded as having been intended by him as given in fair competition with other intending purchasers, if any such were present; or as being a *bona fide* offer to purchase in the proper sense of that word. It was in substance a proposal to take the land in satisfaction of his mortgage debt and his Division Court judgment, and the costs, &c., which together made up the amount of $507.76, and to pay the sheriff his fees. And the sheriff acceded to this, and made the conveyance; not, as it is scarcely necessary to say, by reason of any concert or collusion with Powers, but evidently from a misapprehension of the legal effect of the transaction. It is only right also to say that there is nothing to show that Powers did not honestly believe that the arrangement which bore so harshly upon his debtor was one which the law would warrant.

From this state of facts the proper conclusion is, in my opinion, that which is indicated by Mr. Justice Gwynne, in the short note made by him of the grounds of his judgment in the Court below, viz., that no real sale took place.

The duty of the sheriff in executing the writ of *fieri facias* against lands is to sell and convey. These are two separate acts, as is apparent from the provisions of our statutes upon the subject. I quote from the Revised Statutes which contain the law under which this transaction took place, unaltered. In the Act respecting Writs of Execution—ch. 66—sec. 35 declares that the sheriff may seize or take in execution, sell and convey, &c: sec. 42 makes the advertisement of any lands for sale, during the currency of the writ, a sufficient commencement of the execution to enable the same to be completed by sale and conveyance of the lands after the writ has become return-

able; and sec. 43 enacts that if the sheriff goes out of office during the currency of the writ and before the sale the writ shall be executed and the sale and conveyance of the lands made by his successor in office. And in this last particular more specific provision is made in the Act respecting the office of sheriff, ch. 16, sec. 48, which enacts that in case of the death, resignation, or removal of any sheriff, after he has made a sale of lands, but before he has made the deed of conveyance of the same to the purchaser, and whether such sale was under an execution or for arrears of taxes, the deed of conveyance shall be made to the purchaser by the sheriff who is in office at the time the deed is made.

The sheriff has no interest in the lands. He has not even the special property which he may have in goods which pass by delivery, and of which he has actual possession: *Playfair* v. *Musgrove,* 14 M. & W. 239; *Rumball* v. *Murray,* 3 T. R. 298. He conveys merely in the execution of a statutory power, and as the completion of the execution of the writ which has been partly effected by the sale. The power to convey depends therefore upon the fact of a sale having been made. But though it is only by statute that lands are made saleable in execution, the power exercised by the sheriff is analogous to that under which he sells goods. The title to land is ordinarily conveyed by deed. Personal chattels pass either by deed or by delivery, and sometimes without either. When the sheriff, after selling personal chattels under a *fi. fa.*, assigns or delivers them to the purchaser, he does what is the equivalent of making a deed of land. In each case there is a conveyance, and in each case the conveyance can only be supported by an actual sale. Without a sale the power to convey does not arise.

Thomson v. *Clerk,* 2 Cro. Eliz. 504, was an action of trover for goods, to which the defendant pleaded that the sheriff had seized the goods upon a judgment which the defendant had recovered against the plaintiff, and had delivered them to the defendant in satisfaction of his debt. It was held,

inter alia, that the sheriff, upon a writ of *fieri facias*, cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt.

The same doctrine was affirmed in other early cases, as in *Petit* v. *Benson*, Comb. 452, in which the report says: "It was holden that upon a *fi. fa.* goods may be sold to the plaintiff who sues out the writ, though not actually delivered to him;" and in *Langdon* v. *Wallis*, 1 Lutw. 589, and other cases.

This doctrine, viz., that the delivery of goods by the sheriff to the execution plaintiff (delivery being the appropriate mode of conveying goods), in satisfaction of the judgment debt, does not pass the property unless there has been a sale, seems to me equally applicable to lands which the sheriff assumes to convey in the exercise of his statutory power. It applies to render the conveyance, whether of goods or of lands inoperative, even when no question exists as to the execution plaintiff's right to have his money made out of the property, and when his right to become the purchaser of the property under his own execution is undoubted, but when in place of a sale having been made, the property is conveyed in satisfaction. It is not essential, under the practice in England, that the sale shall have been a public one, for the sheriff may have the goods appraised and assign them to the execution plaintiff at the appraised value; but, whether public or private, there must be a sale. It is the substance and not the form that must be regarded; and so there may have been every formality of advertisement and auction, offer and acceptance, and yet no real sale. I think that was the case here. Powers never really bid $551. A bid means an offer to pay so much money for what is put up for sale. Powers never offered to pay or meant or was understood to offer to pay $551 for what the sheriff was selling. I do not mean to say that one who bids for the right, title, and interest, of an execution defendant in land, may not be compelled to pay the amount he bids although he may be mistaken as to the nature or the value of the interest he buys. That

is a matter which in each case must rest on its own merits. In this case Powers by his bid did not offer to pay money at all, and did not intend to pay money. He meant, and he offered to charge against the property of the present plaintiffs, as heirs of their father, the amount of the Division Court judgment for which that property was not liable, and to take what the sheriff was then selling, viz., the freehold of the seventy-three acres, and the equity of redemption in the twenty-five acres, in payment of that judgment and of his County Court costs.

This cannot be called a sale, and Powers could not reasonably contend that it gains validity from having taken place when and where it did.

We may refer, as a test, to the clause I have quoted from the Act respecting the office of sheriff. If the sheriff had gone out of office after this sale, and before he made the deed, so that Powers would have had to resort to an incoming sheriff for a conveyance, on what principle could he have maintained his right to it? There is really no difference between the power of the same sheriff, who makes the sale, and that of an incoming sheriff to make the deed; but the express provision of the statute in the latter case rather gives emphasis to the prerequisite of the sale.

In my opinion, therefore, the sheriff's deed was inoperative to convey to Powers any interest in the land.

Then is the defendant Ireland in any better position than his vendor? He claims to be a purchaser for value, and has given evidence of having paid his purchase money. Except so far as this circumstance may make a difference in his favor, the language of Sir J. B. Robinson, in *Gardiner* v. *Juson*, 2 E. & A., at p. 207, might be applied to his case. He said: "The party suing out the writ was bound to see that all was regular. The proceeding was at his risk, and he it was who bought the property at the sheriff's sale, and not as agent for any other, but for himself. His selling afterwards to Armstrong was a distinct transaction. He cannot be heard to say that he acquired a title by an abuse

of the process of the Court, knowingly resorted to in his own case, or for his own benefit; and having acquired no title otherwise than by this void proceeding, he could transfer none to a purchaser. Armstrong, who bought to oblige the debtor, his brother-in-law, and at his request, and who has paid but a portion of his purchase money, can stand in no better position than Hope himself."

We are not in a position to say how far the purchase by Ireland, even if for value, was *bona fide*. There are statements in his own evidence, and in that of other witnesses, which lead one to suspect that he knew very well all the facts connected with the sale to Powers, although he may have mistaken their legal effect; and indeed, from his position as tenant of the land under the present plaintiffs, he would most likely have a good deal of familiarity with the affairs of the parties.

We are not now driven into this inquiry, nor have we to determine to what extent the doctrines respecting purchasers for value without notice would apply in ordinary cases to cure such defects as that now in question, because the defendant was let into possession as tenant of the plaintiffs, and he can only be permitted to contest their right to the possession by showing that their title has expired or passed from them. He has to set up against them the title of Powers; not such a title as Powers, if in possession under his deed, might possibly have conveyed to a *bona fide* purchaser. As between the plaintiffs and Powers, the latter acquired no right to the possession; and they have as against their tenant the right to the possession, and to whatever vantage ground it affords for resisting the claim that he is now asserting against them: *Doe, Marlow* v. *Wiggins*, 4 Q. B. 367; *London and N. W. R. W. Co.* v. *West*, L. R. 2 C. P. 553; *Doe Simpson* v. *Molloy*, 6 U. C. R. 302; *Fox* v. *Macaulay*, 12 C. P. 298.

The defendant, Ireland, in his reasons of appeal, gives notice that if the Court should be against the appeal he will ask to have it declared that he is entitled to a lien for improvements.

This claim does not appear on the record or in the rule *nisi*, and does not seem to have been advanced at the trial or before the Court of Common Pleas *in banc*. It, therefore, forms no part of the subject of the appeal, and if well-founded must be pursued elsewhere than in this Court.

I think the appeal should be dismissed, with costs.

BURTON and MORRISON, J J.A., concurred.

Appeal dismissed.

BRUCE V. TOLTON.

Sale of goods—Acceptance—Contract by letters—Construction of.

In the construction of a contract by letters it is not necessary that there should be an express assent, but the requisite assent may be collected by implication from the whole terms of the correspondence.

In reply to an offer by the defendants for the sale of certain wheat, the plaintiffs telegraphed: "Will take your five cars at 85 cents per bushel," to which the defendant replied by postal card on the 25th of July: "Send instructions for the shipment of the five cars spring." On the 26th the plaintiff mailed a postal card with instructions, but this was never received by the defendants. A shipping note mailed on the 27th however reached the defendant on Monday the 29th, but he had sold the wheat on the 27th.

Held, affirming the judgment of the County Court, that the postal card sent by the defendant on the 25th of July amounted to an absolute acceptance and not merely a conditional acceptance should the defendant be satisfied with the instructions he might receive as to the mode of shipment.

Held, also, that even if the plaintiff did not send instructions till the 27th the delay would not have enabled the defendant to treat the contract as cancelled.

Held, also, that the plaintiff was entitled to recover as damages the amount which he had to pay for additional carriage on wheat which he was forced to buy in a more distant market in consequence of the defendant's breach of contract.

THIS was an appeal from a judgment of the County Court of the County of Bruce.

The action was for the non-delivery of 2,000 bushels of wheat, sold by the defendant to the plaintiffs.

The defendant pleaded: 1. That he did not sell the wheat. 2. That the plaintiffs were not ready and willing to accept the same. 3. That it was one of the conditions of sale that plaintiffs should furnish to defendant instructions as to the shipment of the wheat, and the defendant was ready and willing to deliver the same to the plaintiffs, but the plaintiffs failed to furnish instructions, and after a reasonable time the defendant notified the plaintiffs that he considered the contract was not binding on him, and the defendant was prevented from performing the said agreement by the default of the plaintiffs.

It appeared that on the 24th July, 1878, the defendant, who lived in Clifford, met Bruce, one of the plaintiffs, in Walkerton, when they had a conversation in reference to the sale of some spring wheat belonging to the defendant. In the afternoon of the same day Bruce sent the defendant a telegram: "Will take your spring if you guarantee Toronto inspection, No. 2." Signed, Bruce & Harvey. The defendant telegraphed back at twenty minutes after eight o'clock that evening: "Won't guarantee wheat to inspect any grade; sound and good." This was not received by Bruce until the morning of the twenty-fifth, when he telegraphed the defendant: "Will take your five cars—eighty-five." On the same day the plaintiffs received the following postal card from defendant: "Send instructions for shipment of the five cars spring." On the 26th, Bruce swore he wrote a postal card and posted it after three o'clock in the afternoon: "Load upon cars to pass over Grand Trunk." This should have reached the defendant on the morning of the 27th, (Saturday), but he swore he never received it. The plaintiffs made out a shipping bill on the 27th, and posted it, with the following letter, to the defendant: "We herewith send shipping bill for five cars spring wheat, you can send bill to Merchants' Bank here and funds will be placed to your credit, or send bill to your brother, as you choose." When Harvey, one of the plaintiffs, posted this letter, he expected it would be delivered in Clifford that afternoon, but after-

wards learned that the mid-day mail from Walkerton was a closed mail, and that the instructions could not have been delivered until Monday the 29th. On that day the plaintiffs received the following card from the defendant: "Clifford, 29, 7, 1878. Got shipping receipt this morning, but was too late. Shipped the wheat Saturday to meet paper. Waited all week, and heard nothing from you. On the same day plaintiffs replied: "Have disposed of wheat purchased from you, and must have it shipped without further delay"; and again on the 30th they telegraphed: "Are you going to give us the five cars spring wheat we bought from you; answer Yes or No at once," to which they received the following reply, dated 30th July: "No, can't ship wheat, see letter by afternoon mail." The letter read as follows: "Have your message demanding the loading of the five cars spring, but as I stated on post card the wheat is already loaded and shipped on Saturday last, and that closed out all I had, so that I cannot load again. *Had you sent me instructions or even word that* they would be forthcoming, I would have attended to you, *but you did not,* and I was anxious to ship and realize. Hope the mistake has caused you no trouble."

The case was tried before Kingsmill, County Judge, who entered a verdict for the plaintiffs and assessed the damages at $124. Subsequently a rule *nisi* to set aside the verdict, and enter a nonsuit, or for a new trial, was discharged.

The defendant appealed.

The case was argued on the 4th March, 1879 (*a*).

C. Robinson, Q. C., for the appellant. No contract was proved for the sale of the wheat, as all the cases establish that there must be an actual express acceptance. There is no case where an implied acceptance has been relied on as constituting a binding contract except *Thorne* v. *Barwick*, 16 C. P. 369. The question has been fully considered in

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

our Courts in *Marshall* v. *Jamieson*, 42 U. C. R. 115; *Johnston* v. *Wilson*, 28 C. P. 432, and *Webb* v. *Sharman*, 34 U. C. R. 410. The direction as to shipment was most important, as it involved the question of payment and providing cars. No evidence was given to shew how or in what manner payment was contemplated and cars would be provided; and no tender of the price was made before suit. In the interests of trade and commerce it should be held that the mere fact of mailing a letter does not constitute a binding contract, inasmuch as it would place the parties at the mercy of the accuracy of postal regulations: *Shannon* v. *Hastings Mutual Ins. Co.*, 2 App. R. 81; *Wall's Case*, L. R. 15 Eq. 25. The damages were excessive, as the difference between the contract price and that which similar wheat bore at the time it should have been delivered, was all the damages that the respondents were entitled to recover.

Boyd, Q. C., for the respondent. The evidence clearly shews a concluded agreement, as the postal card from the defendant saying, "Send instructions for the shipment of the five cars spring," was a sufficient acceptance. The manner of delivery is a mere incident of the contract of sale: *Leather Cloth Co.* v. *Hieronimus*, 23 W. R. 594. The defendant sold three cars of the wheat before the expiration of the week, so that it was out of his power to have filled the plaintiffs' contract, even if instructions had reached him on the 27th. As to the mailing of the letter constituting an acceptance of the contract, the weight of authority is in favour of the view taken in *Dunlop* v. *Higgins*, 1 H. L. 403, where it was held to be sufficient: *Taylor* v. *Jones*, L. R. 1 C. P. D. 87. The finding as to damages was justified by the evidence.

March 22, 1879 (*a*). MOSS, C. J. A., delivered the judgment of the Court.—We are of opinion that the postal card sent by the defendant on the 25th of July amounted to an

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

absolute acceptance of the plaintiff's offer to purchase, and converted the proposal into a concluded agreement embodying all necessary terms. The correspondence clearly identified the subject matter, and fixed the price.

The telegram of the plaintiffs in the words: "Will take your five cars—eighty-five," was an unequivocal offer for the purchase at 85 cents per bushel of the wheat, for the non-delivery of which the plaintiffs now seek to recover. It is not disputed that this is its effect, when read in the light of the previous communications between the parties. But it is argued that the answer by postal card, which is simply in the words, "Send instructions for shipment of the five cars spring," is at most a conditional acceptance should the defendant be satisfied with the instructions which he might receive as to the mode of shipment.

We do not think that this is the natural import of the language, which on the contrary seems by implication to state an acceptance, and to ask for the directions proper to be given by one who had purchased.

If the vendor really meant to say no more than that if the mode of shipment which the plaintiffs desired should upon consideration prove acceptable he would sell at the named price, he might have been expected to use language better calculated to convey this idea to an ordinary mind.

It seems to us that a person of ordinary business intelligence receiving such a communication would reasonably construe it as an unequivocal acceptance of his offer to purchase.

The learned counsel for the appellant seemed to be pressed with the difficulty of opposing this construction, if we are free to gather from the correspondence, what has been termed, whether accurately or not, an implied acceptance.

He contended, however, that there must be an express assent, conveying in affirmative language an acceptance of the proposal. Looking at the reason of the thing, and the general rules for the interpretation of letters, there does not seem to be any sound foundation for such a doctrine.

No authority has been cited in its support, while *Joyce* v. *Swann*, 17 C. B. N. S. 84, recognizes the reasonable rule that the requisite assent may be collected from the whole terms of the correspondence. There the argument that there had never been a completed agreement as to the price is thus disposed of by Williams, J., at p. 101: "Upon the whole I think there was a binding bargain, because I think there was virtually an adoption by the buyer of the price named by the sellers. It is true the correspondence does not shew any express assent to the price; but in substance it seems to me to amount to a grumbling assent." The same construction was placed upon the language of the defendant's letter by Mr. Justice Willes.

Whether there has been an agreement, the result of mutual assent, must obviously depend in each particular case upon the language employed, and a decision upon one set of correspondence may be of little assistance where the effect of another set comes in question. The case of *Thorne* v. *Barwick*, 16 C. P. 369, however, is very much in point for our present purpose, as the Judge of the County Court has pointed out in the course of his learned and able judgment. Even if in that decision the correspondence was incorrectly interpreted, it is still an authority for the proposition that the acceptance need not be in so many words.

There being a definite concluded agreement, the plaintiffs are not obliged to rely upon the postal card mailed by them on the 26th of July, but not received by the defendant, because even if they did not send instructions until the 27th, there is no ground for holding that this delay would have entitled the defendant to treat the agreement as cancelled.

It is further complained that the verdict was too large by $24, being the amount which the plaintiffs had to pay for additional carriage upon wheat, which they were forced to buy in consequence of defendant's refusal to perform his agreement. It is quite clear that defendant knew that plaintiffs were purchasing in order to resell at once, and that in the ordinary course of trade they would be obliged

to buy in the most accessible market. This they did, and the result is, that they have lost the amount which has been awarded to them by this verdict. Its allowance is fully justified by the principles enunciated in *Bain* v. *Fothergill*, L. R. 7 H. L. 173.

Appeal dismissed.

CHESNEY V. ST. JOHN.

Money paid under mistake—Promissory note—Evidence.

Upon a purchase of land from one Mrs. C., the plaintiff gave her a mortgage for $1,100, of which $200 was paid at the time of execution, and endorsed on the mortgage, the balance was to be paid in nine equal instalments with interest at six per cent., the first of which became due on the 7th of November, 1875. At the same time the plaintiff gave her nine promissory notes, payable at intervals of one year. The first of these notes was drawn payable to Mrs. C. or bearer, one year after date, and contained the additional words: "Which when paid is to be endorsed on the mortgage, bearing even date with this note." In August, 1875, Mrs. C. and her husband executed an assignment in general terms of this mortgage to the defendant, purporting to grant and assign all the estate and interest of Mr. and Mrs. C., in the land, and the mortgage and the moneys thereby secured. In the recital descriptive of the mortgage, it was stated that, in consideration of $1,100 the plaintiff conveyed and assured the lands by way of mortgage to Mrs. C. The amount then due upon the mortgage, was not expressly mentioned in the assignment. At the date of the assignment, the first note had been transferred to a third party for value. The plaintiff in ignorance of this, paid the amount of it to the defendant, to whom he had been notified the mortgage had been assigned. The defendant told the plaintiff that he had not got the note but that he would get it and give it to him. The plaintiff was afterwards sued by the holder of the note, and was compelled to pay it, whereupon he sued the defendant for the amount.

The jury found that the defendant only purchased $800 of the mortgage money and eight notes: that the plaintiffs made the payment under the impression that the defendant held the note as well as the mortgage, and that when the plaintiff paid the money, the plaintiff promised unconditionally to give him the note.

Held, affirming the judgment of the County Court, that the note was a negotiable instrument; and that being negotiable and having been transferred before the assignment, parol evidence was admissible to show that it had not in fact been assigned to the defendant, and that under the circumstances, the plaintiff was entitled to recover.

APPEAL from the County Court of Lincoln.

The action was brought to recover a sum of money paid by the plaintiff to the defendant under a mistake.

It appeared that the plaintiff in 1874 purchased from one Sarah Ann Corson some land for $1100, of which he paid her $200, and gave a mortgage back to secure the balance of the purchase money in nine equal annual instalments of $100 each, with interest at six per cent., and at the same time gave her his promissory notes for each payment of principal and interest. The notes and mortgages bore date the 7th November, 1874. The first note was as follows:

$154.

"SMITHVILLE, 7th November, 1874.

"One year after date I promise to pay Sarah Ann Corson or bearer one hundred and fifty dollars, without interest, until due, which when paid is to be endorsed on the mortgage bearing even date with this note. Value received.

"(Signed,) JAMES CHESNEY."

In August, 1875, Mr. and Mrs. Corson, for an expressed consideration of $900, assigned the mortgage to the defendant. The assignment was absolute in form and purported to assign their estate and interest in the lands and all the moneys mentioned in the mortgage. When the assignment was made the first note had been transferred by Mr. Corson without his wife's consent; but the remaining eight notes were at the time handed to the defendant.

The plaintiff having heard of the assignment paid the defendant the $154 due on the note, and when he asked for the note, for the first time learned that it was not in his possession. The defendant gave the plaintiff a receipt for the note, expressing it to be paid on the mortgage, and the plaintiff swore that he promised to obtain the note and give it to him. Subsequently the plaintiff was compelled to pay one Whately, the holder of the note, who had recovered judgment against him, the amount over again. He thereupon brought the present action against the defendant to recover the amount back.

The case was tried at St. Catharines before McDonald, County Judge.

There was a direct conflict of testimony in reference to

the first note. Mr. and Mrs. Corson swore positively that they only agreed to sell the eight notes and not the first. The defendant swore that he bought the whole nine, and in this he was corroborated by his solicitor, Mr. Currie.

The jury, however, found that the defendant only purchased $800 and eight notes; that the plaintiff made the payment under the impression that the defendant held the note as well as the mortgage, and that the defendant promised unconditionally to give him the note.

The learned Judge entered a verdict for the plaintiff, with leave to the defendant to move. Subsequently a rule *nisi* to enter a nonsuit was discharged by Senkler, County Court Judge of Lincoln.

From this decision the defendant appealed.

The case was argued on the 4th March, 1879 (*a*).

Bethune, Q. C., for the appellant. The verdict is against the weight of evidence. The assignment purported to assign the whole mortgage debt, and the Judge was wrong in receiving evidence to shew that Mrs. Corson only intended to assign the residue after deducting the amount of the promissory note. Even if this payment was made under a mistake of fact it cannot be recovered back as it was under the circumstances a voluntary payment, since the writing transferred by Corson to Whately was not a promissory note, and the plaintiff need not have paid him; *Hall* v. *Merrick*, 40 U. C. R. 566; *Robins* v. *May*, 11 A. & E. 213; *Chalmers* on Bills of Exchange and Promissory Notes.

Kerr, Q. C., for the respondent. The cases cited by the appellant do not shew that the instrument in question is not a promissory note, as here the promise to pay was unconditional. Such being the case, and the note having been transferred before the assignment it was open to the plaintiff to shew that the note in question did not pass to the defendant under the assignment. The respondent's right to recover back the money paid is undoubted; *Holt*

(*a*) *Present*.—Moss, C.J.A., Burton, Patterson, and Morrison, J.J.A.

v. *Ely*, 1 E. & B. 795; *Smith* v. *Sleap*, 12 M. & W. 585; *Mills* v. *Alderbury Union*, 3 Ex. 590; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189. The appellant having only asked for a nonsuit, or to enter a verdict for the defendants, and not for a new trial, the Court ought not to disturb the finding of the jury.

March 22, 1879. MOSS, C. J. A.—This case was twice tried by a jury, a verdict being found on each occasion for the plaintiff. After the second verdict the County Court refused to enter a verdict for the defendant, and from this decision the appeal is brought.

The jury found certain controverted points in favour of the plaintiff, upon which, supplemented by the undisputed facts, the verdict is founded. Upon this appeal we are not embarrassed with any enquiry whether the answers given by the jury are supported by the evidence. Our sole concern is to see whether in point of law the verdict can stand.

The plaintiff has been held entitled to recover a sum of money which he paid to the plaintiff under a mistake or upon a misstatement. In form his action is for money had and received. It is established that the plaintiff upon the purchase of certain land from Mrs. Corson, gave her a mortgage of $1,100, of which $200 was paid at the time of execution, and acknowledged upon the mortgage. The balance was to be paid in nine equal annual instalments, with interest at six per cent., the first of which became due on the 7th November, 1875. The plaintiff at the same time gave her nine promissory notes, payable at intervals of one year. The history of the first of these notes is that of the present difficulty. It was drawn payable to Mrs. Corson or bearer at one year after date, and contained the additional words, "which when paid is to be endorsed on the mortgage, bearing even date with this note." In August, 1875, the defendant obtained from Mrs. Corson

(a) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

and her husband an assignment in general terms of the mortgage.

It purported to grant and assign all the estate and interests of Mr. and Mrs. Corson in the land, and the mortgage and the moneys thereby secured. In the recital descriptive of the mortgage it is simply stated that in consideration of $1,100 the mortgagor conveyed and assigned the lands by way of mortgage to Mrs. Corson. The amount then due upon the mortgage is not expressly mentioned in the assignment.

It is now asserted that the jury have found truly so, that the intention was to transfer eight instalments only and not the instalment for which the above-mentioned note was given. At the date of the assignment this note was not in the possession of Mrs. Corson, but it had been transferred by her husband without her consent for his own benefit. The defendant's account to which the jury have preferred the denial of Mrs. Corson, is that she told him that her husband had left the note with some one without her permission, and that she would get it and give it to him. The plaintiff, in ignorance of the dealing with this note by Corson, but having been notified of the assignment to the defendant, paid it or the amount of the first instalment in two sums, namely, $100 on the 25th of September, and the balance at the date of the maturity of the note.

When making the latter payment the plaintiff says he asked the defendant for the first note, when he replied that he hadn't it, but would get it and give it to him. The defendant's version tallies with this, for he says that he told the plaintiff that he had not got the note from Mrs. Corson, but that when he got it he would give it to him, and he adds that he told him it could not be collected, Two days afterwards the plaintiff was sued by the holder of the note, and having called upon the defendant was taken by him to an attorney, who defended the action. but a judgment was recovered against the present plaintiff, and he was compelled to pay the demand. This action was then brought.

The jury found that the defendant only purchased $800 of the mortgage money and eight notes; that the plaintiff made the payment under the impression that defendant held the note as well as the mortgage; and that when plaintiff paid the money the defendant promised unconditionally to give him the note.

The defendant contends, in the first place, that the instrument was not a promissory note, and that therefore the plaintiff could not have been compelled to pay the holder, if he had properly defended himself. I am of opinion that the instrument was negotiable, and that a *bonâ fide* holder for value could have recovered against the maker. It is not payable upon a condition or upon an uncertain event. It contains an absolute and unqualified promise, accompanied merely by a memorandum indicating the mode in which the payment was to be evidenced. It is essentially different from the instruments to which the quality of negotiability was denied in *Robins* v. *Moy*, 11 A. & E. 213, and *Hall* v. *Merrick*, 40 U. C. R. 566. In the former the promise was to pay a certain sum to the payees, to be held by them as collateral security for any moneys owing to them by a certain person, which they might be unable to recover on realizing the securities they held and others which might be placed in their hands by their debtor. Plainly this was not an absolute and unconditional promise to pay the amount at the time specified. It was really no more than an informal guarantee, and was essentially different from that now in question. In the latter case the instrument, which contained in its body the words: "This note to be held as collateral security," was held not to be a promissory note, but to be in the nature of a guarantee. This was not only the construction which the language irresistibly suggested, but from the evidence of the plaintiff it appeared to be the character which in fact it was intended to bear. The holder could not, at the time specified for payment, properly demand more than might then happen to be due to the payee from the person for whose benefit the guarantee was given. If it is neces-

sary to resort to authority, the case of *Wise* v. *Charlton*, 4 A. & E. 786, seems to be much more in point. To a promissory note in regular form there was added above the name of the maker that he had deposited in the payee's hands title deeds as a collateral security, and it was held that the addition was a mere memorandum, not qualifying the main agreement. Coleridge, J., observed that it was not the less a promissory note from a memorandum of another kind being added, importing that a collateral security had also been given. So in this case, there is no more than a memorandum importing that payment, *when made*, is to be endorsed upon a certain mortgage. *Fancourt* v. *Thorne*, 9 Q. B. 312, is to the same effect. It is a circumstance worthy of regard that the only conceivable object of giving the notes was, to enable the mortgagor to negotiate and use any of them as her occasions might require.

This being a negotiable promissory note, in what position does the case stand upon the finding? It is, that the note having passed into the hands of one, who must *primâ facie* be taken to have been a holder for value, was honestly and reasonably believed by the plaintiff to be held by the defendant, and that under this belief he paid his money; that in fact the defendant did not own and had never purchased this note or the corresponding instalment; and that he had unconditionally promised the defendant to give him the note. In my opinion the plaintiff is entitled to recover the money he paid under such circumstances. He paid under a natural but mistaken belief, induced by the defendant himself, that the defendant owned the note. The defendant not only did not own the note, but according to the finding of the jury must be taken to have known that he was not entitled to the money he received from the plaintiff. The law would sanction a monstrous injustice if it did not wrest from the defendant what he had thus obtained. It has been declared upon high authority that the principle upon which such an action as the present proceeds is clear and

simple in the extreme, namely, that no man should by law be deprived of his money, which he has parted with under a mistake, and where it is against justice and conscience that the receiver should retain it: *Freeman* v. *Jeffries*, L. R. 4 Ex. 197. Justice and good conscience certainly seem to call upon this defendant to return the money.

The defendant placed great reliance upon the rule which excludes parol testimony when offered to vary a solemn instrument, but this admission of the evidence upon which the jury found that the first instalment and the corresponding note had not been included in the defendant's purchase, does not infringe upon the rule. It is to be observed that the assignment does not purport to transfer the nine instalments. Its operation is confined to the estate and interest of the mortgagee in the lands, and the mortgage and the moneys thereby secured. Now, if the first note were not negotiable, or had not been transferred, it might have been reasonable te say to the plaintiff that he could not assert that by the true agreement the defendant had not become entitled to the money. That would be a contradiction of the written instrument, which in terms would have passed this as well as the other instalments, and there would be no ground for permitting the plaintiff to assert a right in Mrs. Corson upon which she was not herself insisting in a proper manner. But the note being negotiable, and having been transferred before the assignment, it was perfectly allowable to show this fact, and thus to prove that the money in question did not belong to the defendant by virtue of the assignment. It is satisfactory to find that no rule of law is opposed to a judgment which is in complete accord with justice. I think the appeal should be dismissed, with costs.

PATTERSON, J. A.—The plaintiff paid the money which he seeks to recover back in this action, under the belief that the debt had been assigned by Mrs. Corson to the

plaintiff. The question is, had it been so assigned? If it had, then the plaintiff is without remedy against this defendant, notwithstanding that he may have paid the money twice over. If it had not, then it was paid under a mistake of fact, and can be recovered back.

I think the assignment executed by Mrs. Corson and her husband passed to the defendant all the mortgage money which either of the assignors had power to assign; and, therefore, if the plaintiff had to treat the matter as if Mrs. Corson had retained one of the nine notes in her hands, intending, or rather now asserting that she intended to assign only $800 and the eight notes representing that sum, he would in my opinion fail. To hold otherwise would be varying the deed by parol evidence. But if one hundred dollars of the debt had been already assigned, so that only $800 remained within the control of Mrs. Corson that sum alone would pass by the assignment of the covenant. She could only have enforced payment against the plaintiff of $800, and her assignee merely took her position: (R. S. Ont., ch. 116, sec. 10.) I am satisfied that the promissory note in question was a negotiable instrument, notwithstanding the memorandum that the money when paid was to be endorsed on the mortgage. I take that to be a reference to the nature of the consideration for which the note was given which does not destroy any of the essentials of a promissory note. The amount is certain; the payee is certain; the time is certain; and the money is payable at all events, and not upon any contingency.

The note was passed to Martin & Parkes for value. There is not evidence which makes it by any means certain that those gentlemen did not acquire a good title to it. It is certain from the defendant's own evidence that he knew he never had the note, as he says he relied on Mrs. Corson's promise to get it for him; and that he knew it was in the hands of some one to whom Mr. Corson had given it; and that he represented to the plaintiff that it would be forthcoming for his protection.

I do not see any sufficient reason for disturbing the judgment given in the County Court, and for entering either a nonsuit or verdict for defendant as asked in the rule *nisi*.

The appeal must be dismissed, with costs.

Burton and Morrison, JJ.A., concurred.

Appeal dismissed.

Church v. Fenton.

Sale of lands for taxes—Indian lands—B. N. A. Act, sec. 91, *clause* 24—*Liability to taxation—Lands not mentioned in warrant,* 32 *Vic. ch.* 36, *sec.* 128, *O.—Lists not properly authenticated—Sec.* 155.

In 1854, a tract of land was surrendered to the Crown by the Indians, to whom the interest arising from the sales thereof by the Crown was to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands, and after the passing of the B. N. A. Act, still continued under the management of this department, which was under the control of the Dominion Government, "Indians and lands reserved for Indians," being by sec. 91, clause 24 of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the 15th of February, 1858, and the last on the 29th of July, 1867, when the lot was paid for in full, and on the 14th June, 1869, the patent from the Dominion Government issued therefor. In 1870, the lot in question was sold for the taxes assessed and accrued due for the years 1864-9.

Held, affirming the judgment of the Common Pleas, 28 C. P. 384, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands within the meaning of the Assessment Acts, and liable to taxation under 29 Vic. ch. 19, re-enacted in 1866, and the sale was therefore valid.

It was contended that the Ontario Legislature having repealed the Act of 1866, had after Confederation no power to levy these taxes, the land having been withdrawn from their jurisdiction; but

Per Moss, C.J.A., that this objection was completely met by the remarks of Gwynne, J., in the Court below.

Per Burton, J.A.—Assuming the lands to come within the definition of Indian reserves, the Local Legislature had not attempted to tax lands placed under the control of the Dominion Government, but has treated the purchaser of such lands as the owner, and declared them liable to assessment in his hands.

Held, also, that the fact that the patent was issued to the plaintiff after the accrual of the taxes did not entitle him to succeed in this action,

leaving the purchaser to proceed for a cancellation of the patent, making the crown a party to the suit, because the patent was issued before the sale, and this passed the patentee's interest to the purchaser; but *semble*, that such a course would have been necessary if the patent had been issued to the locatee after the sale.

The warrant authorized the sale of "the lands hereinafter mentioned." The lands were not mentioned in the warrant, but were contained in a list attached thereto which made no reference to the warrant; nor were the lists authenticated with the seal of the corporation and the signature of the warden as required by sec. 128 of 32 Vic., ch. 36.

Held, that the description of the lands was a sufficient compliance with the above section, and that the want of the seal and signature on the lists was cured by the 155th section.

THIS was an appeal from the judgment of the Common Pleas discharging a rule *nisi* to set aside a verdict for the defendant, and to enter a verdict for the plaintiff, reported 28 C. P. 384.

The case was argued on the 10th September, 1878 (*a*).

M. C. Cameron, Q. C. (*G. H. Watson* with him), for the appellants. The lands in question were Indian lands, or lands held in trust for the Indians by the Crown, and were not liable to sale for taxes: 16 Vic. ch. 182, secs. 2 and 6; Con. Stat U. C. ch. 55, sec. 9, sub-secs. 1 and 2; 29 & 30 Vic. ch. 53, sec. 9, sub-secs. 1 and 2; 32 Vic. ch. 36, sec. 9, sub-secs. 1 and 2; B. N. A. Act, sec. 91, sub-sec. 24, sec. 125; Indian Act of 1876, sec. 3, sub-sec. 8, secs. 4 and 65; *McCulloch* v. *State of Maryland*, 4 Wheat. 317; *Osborne* v. *Bank of the United States*, 9 Wheat. 738, 859, 860; *Brown* v. *State of Maryland*, 12 Wheat. 435, 436; *Weston* v. *City of Charleston*, 2 Peters 449, 467; *Bank of Commerce* v. *New York City*, 2 Black 620; *Pomeroy's Constitutional Law*, 305; *Cooley's Constitutional Limitations*, 2nd ed., 482; *Cooley* on Taxation, 56; *Hilliard* on Taxation, 148; *Sedgwick* on Constitutional Law, 2nd ed., 507, and notes; *Hamilton* v. *Eggleton*, 22 C. P. 636; *Proudfoot* v. *Austin*, 21 Gr. 566; *Jones* v. *Bank of Toronto*, 13 Gr. 74; *Ridout* v. *Ketchum*, 5 C. P. 50, 7 C. P. 464; *McGill* v. *Langton*, 9 U. C. R. 91; *Allan* v. *Fisher*, 13 C. P. 63; *Street* v. *County of Kent*, 11 C. P. 255; *Street* v. *County of Simcoe*,

(*a*) *Present.*—MOSS, C.J.A., BURTON and MORRISON, JJ.A., and BLAKE, V. C.

22 U. C. R. 7, 2 E. & A. 211; *Leprohon* v. *Ottawa*, 2 App. R. 522; *Young* v. *Scobie*, 10 U. C. R. 372. The sales were not legal, there having been no proper authority to the treasurer to sell: *Hall* v. *Hill*, 22 U. C. R. 578; Assessment Act of 1868-9, section, 128; Consol. Stat. U. C. ch. 2, sec. 18, sub-sec. 2, sec. 19; R. S. O., ch. 1, sec. 8, sub-sec. 2, sec. 10; *Morgan* v. *Quesnel*, 26 U. C. R 539; *Canada Permanent Building and Savings Society* v. *Agnew*, 23 C. P. 200; *Dormer* v. *Thurland*, 2 P. Wms. 506; *Sugden* on Powers, 247; *Chance* on Powers, 329; *Bell* v. *Orr*, 5 O. S. 433: *Townsend* v. *Elliott*, 12 C. P. 217; *Laughtenborough* v. *McLean*, 14 C. P. 175; *Allan* v. *Fisher*, 13 C. P. 63. The lands authorized to be sold were not properly authenticated under the hand of the warden and corporate seal of the county: *Hutchinson* v. *Collier*, 27 C. P. 249. It was not shewn that certificates of sale were given in accordance with the Assessment Act, secs. 141, 146; *Williams* v. *McColl*, 23 C. P. 189; *Hall* v. *Hill*, 22 U. C. R. 578, 2 E. & A. 569. It does not appear that the lot was ever returned by the Commissioner of Crown Lands to the county treasurer as being sold, located, leased, or agreed to be sold by the Crown: *doe d. Bell* v. *Reaumore*, 3 O. S. 245; *doe d. Bell* v. *Orr*, 5. O. S. 433; *doe d. Upper* v. *Edwards*, 5 U. C. R. 594; *Peck* v. *Munro*, 4 C. P. 363. The land, by the Act of Confederation, was in the Crown as represented by the Dominion Government, and was granted by the Crown after the alleged taxes accrued; the Crown, therefore, disregarded the taxes, and the patent from the Crown must in a Court of law prevail against the tax title until the patent has been cancelled or vacated in a proceeding to which the Crown is made a party. At the time of suit the plaintiff was entitled to a portion of the lands at all events, viz., the land sold at the second sale, and the verdict should be for plaintiff: C. S. U. C. ch. 27, sec. 22; ch. 2, sec. 17, sub-sec. 2; R. S. O., ch. 51, sec. 31; ch. 1, sec. 8, sub-sec. 2; *Junkin* v. *Strong*, 28 C. P. 498.

Reeve, for the respondents. From and after the date of the surrender by the Indians to the Crown of the lands in

question, they ceased to be lands held by Her Majesty in trust for or for the use of the Indians, and were therefore properly chargeable with taxes, and liable to be sold in default of payment thereof. The warrants under which the sales of the lands were made had affixed thereto the corporate seal of the county and the signature of the warden, and the lists of the lands liable to be sold thereunder; and the warrants were intended to form, and did form respectively, one instrument, and were so framed that although the lists had not affixed to them such seal and signature, they were sufficiently authenticated as the lists of lands so liable to be sold under the warrants, and as the lists returned with the warrants to the treasurer. It was established by other and sufficient evidence that the lists were the lists which formed part of the warrants when the same were returned to the treasurer, commanding him to sell the lands. The want of such seal and signature was in any event a defect or irregularity which would be cured by 32 Vic. ch. 36, sec. 155. He cited *Ryckman* v. *VanVolkenburgh*, 6 C. P. 385; *Charles* v. *Dulmage*, 14 U. C. R. 585; *Morgan* v. *Perry*, 17 C. B. 334; *Cotter* v. *Sutherland*, 18 C. P. 357; *Fenton* v. *McWain*, 41 U. C. R. 239; *Mayor of Essenden* v. *Blackwood*, L. R. 2 App. Cas. 574; Indian Act, 1876; 27 Vic. ch. 19, sec. 9; 29 & 30 Vic. ch. 53, sec. 128.

March 22, 1879. (*a*) Moss, C. J. A.—I agree with the contention that upon the lands in question being surrendered by the Indians to the Crown, they were no longer lands held for or in trust for Indians, but became ordinary, unpatented lands within the meaning of the Assessment Acts. The history of the legislation upon this subject has been so lucidly traced, and its effect so fully explained, in the judgment pronounced by Mr. Justice Gwynne, that it would be unprofitable to review it at any considerable length. It will be quite sufficient to state concisely the

(*a*) *Present.*—Moss, C.J.A., Burton and Morrison, JJ.A., and Blake, V.C.

conclusions at which I have arrived. I accede to the correctness of the appellant's position that prior to the enactment of the Statute respecting the management of Indian Lands (23 Vic. ch. 151), property held by the Crown under that designation, whether surrendered or unsurrendered, and whether sold or unsold, was not liable to taxation. The prior legislation had only subjected to that liability Crown, Clergy, and School lands, which were sold, or for which licenses of occupation were granted. Nor did 23 Vic. ch. 151 make Indian lands assessable. It authorized the Governor in Council to declare the provisions of the Public Lands Act passed during the same session to be applicable to Indian lands, and in the following year an Order in Council was made extending certain sections of the Act to Indian lands, but among these the very section, the 27th, which made public lands when sold or licensed liable to taxation, was not included. The order, however, introduced the other clauses, which may in a general sense be said to have attached to Indian lands the incidents belonging to public lands. As a matter of policy it is not easy to perceive any reason why they should not have been subjected to taxation under similar circumstances. However, I take the substantial result to have been that they were placed on the same footing as the public lands of the Province, and were thenceforth properly describable as unpatented lands vested in or held by her Majesty. Two years afterwards the Assessment Act of 1863 dealt with the liability of unpatented land to assessment in terms of great generality, by providing that such land, when sold or agreed to be sold, or located as a free grant, should be liable to taxation, and that the interest of the person to whom the land was agreed to be sold or located might be sold for satisfaction of arrears of taxes. I think there is no room for doubt that lands surrendered by the Indians were unpatented lands within the meaning of this legislation. The obvious intent was, to give effect to the sound policy of subjecting purchasers or locatees of any lands which the Crown had to sell or locate to their share

of the burden of municigal taxation from the date of their interest being acquired, instead of leaving them exempt until the patent was actually issued. If they failed to discharge this duty, their interest was justly made transferable to a purchaser, who assumed their position with regard to the Crown. I am prepared, therefore, to hold that the land now in dispute having been sold prior to the 1st of January, 1863, was from that date liable to assessment and to sale for payment of arrears of taxes.

But it is ccntended that because the British North America Act has entrusted the exclusive management and control of Indians and lands reserved for Indians to the Government of the Dominion, this sale is ineffectual. So far as that argument is founded upon a want of authority in the Provincial Legislature to re-enact after Confederation the provisions under which such lands mlght have been previously assessable, it is completely met by the remarks of Mr. Justice Gwynne, which I willingly adopt. But it was strenuously urged before us that, conceding the existence of this authority, and the consequent liability of the land to assessment under the Provincial Act, yet the Crown, as represented by the Government of the Dominion, had issued the patent after the accrual of the taxes, and in disregard thereof, and that therefore the patentee must succeed in ejectment, the purchaser's only remedy (if any) being to proceed for the cancellation or vacating of the patent, and to bring the Crown into Court for that purpose. That argument would not be without plausibility if the patent had been issued after the sheriff's deed, but it seems to me to be deprived of all weight by the simple consideration that the patent had been issued more than a year before the sale. The effect of the sale was to transfer all the interest of the locatee under the Crown, to the purchaser from the sheriff. If the locatee had then paid all his purchase money, but had not received his patent, the purchaser would only have gained the right to obtain a patent to himself; and if the patent had nevertheless been issued to the original locatee, I presume that the legal

estate would have been vested in him, and the only remedy would have been that which the appellant now indicates. But that course of reasoning is manifestly inapplicable where the tax sale followed the patent. Then the interest which the original locatee had, and which was liable to be divested, was the fee simple absolute. The patent was rightly issued, because although taxes were then in arrears, there was no reason to assume that the land would be sold for their payment, and in fact there was no other person than the appellant who had then the least claim to the patent; but if taxes were properly assessed against the property, and the sale was legally made, the fee simple passed to the purchaser as effectually as if the sale had been made under a writ of *fieri facias.*

The next point urged by the appellant is, that there was no legal warrant authorizing the sale of this land. In the Court below the objection was understood to mean that the lands to be sold were embodied in the warrant, instead of being in a list attached to the warrant.

It now appears that this description was not embodied in the warrant itself, and that there was a list attached, but the irregularity complained of is that this list was not authenticated by the seal of the corporation and signature of the warden, as required by the 128th section of the Assessment Act of 1869, and that the warrant simply empowers the treasurer to sell the lands "*hereinafter* mentioned," while there is no reference in the warrant to the list, nor in the list to the warrant. The printed case states that there is a list, or rather lists of lands in each township attached to or bound up with the warrant; that the warrant is written on one side of a half sheet of foolscap paper, and is at the front that the lists are also written on half sheets of foolscap paper, and the half sheets comprising the same follow each other after the warrant in alphabetical order; that the sheets comprising the lists and the warrant, are attached together by being pasted the whole length of the top; and that none of these sheets have the signature of the warden or seal of the county, except the first which contains the

warrant only. The want of the seal and signature to the lists was held in *Fenton* v. *McWain*, 41 U. C. R. 239, to be cured by sec. 155, and I see no reason to doubt the correctness of that decision.

The other objection seemed more formidable, but upon consideration I do not think that we are bound to give it effect. The statute requires one of the authenticated lists to be returned to the treasurer with a warrant thereunto annexed under the hand of the warden and seal of the county commanding him to levy upon the land for the arrears due thereon, with his costs. The land referred to is that included in the list. The instrument, therefore, which is contemplated, is an authenticated list with a warrant thereto annexed. The annexation of a warrant is the special feature prescribed. I think it reasonable to hold that when it is annexed the list and warrant are incorporated into a single instrument, so that the lands "hereinafter mentioned" describe with appropriateness the lands in the list.

For my own part I do not think that we are bound to resort to any nice criticism of the language of the instrument. The lands have been sold for arrears of taxes legally imposed, and a deed has been given. The sale was under a warrant given by the proper officer to the proper officer, and intended to authorize the sale of this land. A single instrument passed from the one to the other, and it comprised this land in such a way that to common apprehension it was one of the parcels which the treasurer was directed to sell. Having regard to the language of the Statute, and the liberal interpretation which we are required to give it in view of the policy of this curative legislation, I think the objection should not be allowed to prevail.

The manner in which the Court below dealt with the two acres seems to me to be in accordance with reason and justice.

In my opinion the appeal should be dismissed, with costs.

BURTON, J. A.—The learned Judge who delivered the judgment in the Court below has relieved us of a very laborious duty in tracing up and reading the various enactments relating to Indian lands and their management, and the Assessment Laws previous to the 27 Vic., ch. 19, 1863, which the learned counsel for the appellants admitted was the enactment which must govern this case, if the objection as to the jurisdiction of the Local Legislature since Confederation to pass Acts for the enforcement of taxes against lands of the nature of the land in question be not well founded; but he contended that this Act applied only to those lands which in the 23 Vic., ch. 2, are termed "Public Lands," and in the enactment previously are styled "Crown, Clergy, and School Lands."

As to these lands, so far back as 1853, provision was made in the Act for the sale and management of the public lands, for furnishing a list of such portions as were sold, or for which a license of occupation was issued, to the Registrar, in order that they might be assessed; and by the Assessment Act of the same session the Commissioner of Crown Lands was required to transmit to the Treasurer of every county a list of such lands to carry out such assessment.

Provision was made in the same Act enabling the Governor in Council to extend to the Indian lands under the management of the Chief Superintendent any of the provisions of that Act, and in subsequent amendments under which the management of the Indian lands was placed under the control of the Commissioner of Crown Lands, similar power is given.

Regulations were subsequently made by Order in Council, 7th of August, 1861, extending and making applicable to Indian lands certain provisions of the Public Lands Act, but the 27th section—which rendered all public lands, leased, appropriated, or set apart for any person, or for which licenses of occupation should be granted, liable to the assessed taxes of the township, although no patent was issued—was not included among them; and so matters continued until the passing of the Act of 27 Vic., ch. 20,

already referred to, which is entitled An Act to amend the Asssesment Act in respect of arrears of taxes on non-resident lands, and for other purposes respecting Assessments.

This Act enacted, That "*unpatented land* vested in or held by Her Majesty, which shall hereafter be sold or agreed to be sold to any person, &c., shall be liable to taxation, and any such land which has already been sold or agreed to be sold shall be held to have been liable to taxation since the 1st of January, 1863;" and the 108th section of the Consolidated Assessment Act was amended by providing that the Commissioner of Crown Lands, who *virtute officio* had then charge of the Indian lands, should transmit a list of such lands to the municipal officials.

But it is said that this amendment cannot apply to these lands, which it is contended are exempt from taxation under the latter part of sub-sec. 1 of section 9 of the Act to which it is an amendment.

It being a well established rule, speaking generally, in the construction of Acts of Parliament, that the Sovereign is not included unless there be express words to that effect, and that lands therefore vested in the Crown were not liable to taxation under the general words used in this Assessment Law, it is difficult to understand why the framer of that Act should have thought it necessary to introduce the so-called exemption contained in that sub-section, unless it was intended by the introduction of these words to raise an implication that in all cases where lands were not so vested *for the general uses of the Province or for the Indians*, they were not to be exempt. I must confess that I find it difficult to perceive how lands can be said to be vested in Her Majesty for the public uses of the Province or in trust for Indians, after the Crown through its proper officer has contracted to sell them.

But the Courts did hold that lands, though agreed to be sold, were not subject to assessment, as no license of occupation, lease, or patent had been granted, and this decision led to the passage of the Act of 1863, which contained the clauses I have already cited as to unpatented lands vested

in Her Majesty which should thereafter be sold or agreed to be sold.

I have already expressed an opinion that, if the Statute can be treated as by implication admitting that lands though vested in Her Majesty were not exempt except in the two classes of cases specially referred to in sub-section 1 of section 9, these lands, not being within either of those classes, but being in equity the property of the purchaser, were liable to assessment without the aid of the amendment; but if that view be incorrect, I admit that it is difficult to sustain it consistently with the decision in *Street* v. *The Corporation of Kent*, 11 C. P 255; still, a construction has to be placed on section 128, which, as Mr. Justice Gwynne has pointed out, appears to be in conflict with the language of section 9 as re-enacted after the passing of the amendment in 1863. I think, notwithstanding the awkwardness which he refers to as to that mode of legislation, that section 128 may be regarded as an exception to the exemption contained in section 9; and that clause would then read :—

"All lands vested in or held by Her Majesty for the public uses of the Province, and all property so vested in Her in trust for any tribe of Indians, shall be exempt from taxation, except those portions which have been sold, or may be sold, or agreed to be sold, to any person; and as to these, in cases of past sales they shall be held to have been liable to taxation since the 1st of January, 1863."

No good reason has been assigned for placing a restricted meaning on the words "unpatented lands hereafter sold or agreed to be sold," and to confine them to public lands, other than those intended for the benefit of the Indians. Neither the Crown nor the Indians are affected by the lands becoming assessed; the purchaser is regarded in equity from the time of the sale to him as the owner, and his interest alone can be sold. The assessor merely satisfies himself that the lands have been sold by the Crown; he is not called upon to enquire and has no means of ascertaining whether the proceeds of the sale are to be applied

for school or general purposes, or for the benefit of Indians, and no grounds of public policy have been suggested why the Legislature should have drawn a distinction between one portion of the public lands and another after the use and enjoyment of them have passed to a purchaser under a contract of sale.

I do not understand the objections founded upon the Confederation Act; the local Legislature has not attempted to tax lands placed under the exclusive control of the Dominion Government and Legislature, assuming these lands since the surrender to come within the definition of "Indian Reserves," but treats the purchaser of such lands as the owner, and in his hands declares it liable to assessment.

The local Legislature had this power before Confederation, and it is confirmed to them by the British North America Act, the only distinction being that it is prohibited from taxing the property of the Dominion, or either of the other Provinces.

The learned Chief Justice has dealt with the points taken in the reason of appeal as to the issue of the patent by the Crown after these taxes had accrued, and the consequent right of the plaintiffs to recover in the action whatever might be the ultimate rights of the parties on a proper proceeding for the cancellation of the patent, and I fully concur in his reasoning and conclusion.

It remains to consider the objection urged against the validity of the sale for defects in the warrant or proceedings.

The objection which was raised at the trial was confined, as I understand the notes, to the fact that the lists required to be submitted by the treasurer to the warden were not authenticated by the seal of the corporation and his signature, as required by section 128 of the Assessment Act; but it is shown that those lists were submitted to the warden and attached by him to the warrants and returned, one to the treasurer and the other to the clerk. The substantial requirements of the Statute in this respect were therefore complied with, and the omission to authen-

ticate them in the mode pointed out is, I should say, cured by the 155th section.

But the point taken before us, and apparently argued in the Court below, was, that the warrant did not authorize the sale, no lands being mentioned in it or mentioned in a schedule referred to in it. The learned Judge who delivered the judgment of the Court below appears to have supposed that the objection was, that the lands were described in the body of the warrant, instead of being set forth in a list attached; and assuming that the lands were set forth in the body of the warrant, held it, and I should think properly, to be a sufficient compliance with the Act; but that is not the point which was intended to be urged. The point taken by Mr. Cameron was, that the warrant was contained in a half sheet of paper, and ended with the signature and seal of the warden; and what that warrant authorized was the sale of the lands "hereinafter mentioned," that is to say, mentioned in the warrant: no lands being mentioned. I did not understand Mr. Cameron to contend that if the warrant had referred to the lands "as the lands mentioned in the lists hereunto attached," that would not have been sufficient; but that there being no reference in the warrant to the lists, nor in the lists to the warrant, it did not authorize the sale of any lands whatever. It must be immaterial whether the lands are embodied in the warrant or in a list attached, so long as it appears from the warrant that it authorizes the sale of those lands; if it does not, the defect is one which would not be cured by the 155th section.

It certainly is a very loose way of preparing so important a document, and we must look at the section of the statute to ascertain if it can be upheld as a valid warrant.

That section provides that when taxes have been due for a certain period the treasurer shall prepare a list in duplicate of all the lands liable to be sold, with the arrears set opposite to each lot, and submit the same to the warden, who shall authenticate them as above indicated; and one of such lists shall be deposited with the clerk,

and the other returned to the treasurer, with a warrant thereto attached, commanding him to levy, &c.

What was done here was, that the lists were duly prepared and sent to the warden, who in each case attached a warrant to them, and signed and sealed the warrant and returned them in that state to the designated official. The Statute intends that the list so prepared shall in fact form part of the warrant, and when we find that there is evidence that the lists were prepared in accordance with the Act and sent to the warden, and that they were attached to a warrant bearing the corporate seal and the warden's signature, at the time when the treasurer received them from the warden, I think that it may be regarded as one entire instrument, and thereby gives effect to the words "hereinafter mentioned," which would otherwise be futile and inoperative.

On the whole I think the warrant may in this way be upheld, and as in the main question I agree with the Court of Common Pleas, I think this appeal should be dismissed, with costs.

BLAKE, V. C.—For the reasons assigned in the Court below, and in this Court, I think it is reasonably clear that the lands in question, being lands agreed to be sold, were liable to assessment. I am also of opinion that, although the lists of lands were merely attached to the warrant, duly authenticated, the Act has been substantially complied with, and thereby sufficient authority was given to the Treasurer to sell. I think the appeal should be dismissed, with costs.

MORRISON, J. A., concurred.

Appeal dismissed.

IN RE GEARING, AN INSOLVENT.

Insolvent Act of 1875—Married woman—Separate trading.

Under the Insolvent Act of 1875 a married woman may make herself liable to be placed in insolvency.

At a meeting of the insolvent's creditors a sale of his estate was made to his wife, who was not present at the meeting and took no personal part in its inception or completion. It was arranged that the purchase should be in her name, and that she should give her promissory notes for the price, secured by a mortgage upon her separate real estate. It appeared that it was understood by every one engaged in this transaction that its object was to enable the husband to continue the business. After the security had been given the shop was re-opened: the same sign-board remained over the door, and the business appeared to be carried on precisely as before. Purchases of goods were made in her name, for which she signed notes, but the orders were always given by her husband, and the correspondence, although conducted in her name, was written and signed by him without any communication with her. As soon as he obtained his discharge he substituted his own name for his wife's in correspondence and in notes. Upon a writ of attachment issuing against her after her husband's discharge:

Held, affirming the judgment of the County Court, that even if the stock-in-trade was her separate property, she never employed it in trade separate from her husband, but allowed him to employ it in a business really his own: she was, therefore, not a trader within the meaning of the Insolvent Act of 1875.

THIS was an appeal from the decision of the County Court Judge of the County of York, sitting in insolvency, holding that the respondent was not a trader within the meaning of the Insolvent Act of 1875. The material facts are stated in the judgment below.

The case was argued on the 22nd April, 1879, before Moss, C. J. A., sitting alone in insolvency.

T. D. Delamere, for the appellant. The question for the decision of the Court is, whether the respondent, who is a married woman, is a trader within the meaning of the Insolvent Act of 1875. The case is distinguishable from *Meakin* v. *Samson*, 28 C. P. 355, as the respondent was possessed of separate estate which she pledged for her husband's business; and her creditors, who gave her credit on the faith of her owning the business and being possessed of separate estate, are seeking to enforce their remedies against her estate by putting her into insolvency, while in *Meakin*

v. *Samson* the creditors of the husband were proceeding against goods claimed as the property of the wife, and obtained in her name by her husband. Under the circumstances here, it should be held that the respondent is estopped from denying her position as a trader. The change of name on the renewal notes makes no difference, as she would be liable on the original notes: *Carruthers* v. *Ardagh*, 20 Gr. 579,

Dr. *McMichael*, Q. C., for the respondents. The evidence conclusively establishes that the respondent's position as a trader was only ostensible, as she was merely substituted for her husband while he was prevented from carrying on the business. It was, however, managed by him during the whole period. Under such circumstances it cannot be said that she was a trader within the meaning of the Act. *Meakin* v. *Sampson*, is a clear authority in favour of our contention. He cited *Ex parte Gibbs*, 2 Rose 38; *Re Lake*, L. R. 8 Chy. 51; *Clarke's* Insolvent Act, pp. 12 & 13.

April 29th, 1879. MOSS, C. J. A.—It was contended upon the argument that the question on this appeal simply is, whether the respondent was a trader within the meaning of the Insolvency Act, when she contracted her liability to the attaching creditor. The learned Judge of the County Court answered this question in the negative, and the result is, that if she was a trader, his decision must be reversed.

Other objections to the validity of the writ were urged before him, but he proceeded upon the sole ground that she was not subject to be placed in insolvency, and I presume that the other points are now deemed untenable.

For the determination of the case it appears to me to be necessary to note the following facts only:—The respondent, who was married in 1859, has ever since resided with her husband. He carried on a mercantile business until February, 1876, when he became insolvent, and his estate was placed in liquidation. He seems to have made some attempt to procure the acceptance of a composition by his creditors, or at least their consent to his discharge. In

May, 1876, a meeting of the inspectors of the estate was held to decide upon its disposal, and the result was, that a sale was made to Mrs. Gearing of the whole assets at the price of $8,000. She was not present at the sale, and took no personal part in its inception or completion. Her husband's statement is that in truth he was the purchaser, but as he had no other security to offer, and had not obtained his discharge, it was arranged that the purchase should be in his wife's name, and that she should give her promissory notes for the price, secured by a mortgage upon her separate real estate.

Looking at the evidence of the appellant's solicitor, it may be doubted whether an arrangement was ever made in these terms; but the conviction produced upon my mind by reading the whole of the statements is, that it was thoroughly understood by every one engaged in the transaction that its object was to enable the husband to continue the business.

I cannot believe that the appellant or any other of the creditors seriously entertained the idea that this lady designed to embark in business on her own account. After the security had been given by her, the shop was re-opened, the same sign-board remained over the door, and to the ordinary on-looker the business appeared to be carried on precisely as before Gearing's insolvency. Purchases of goods were made in her name, for which she signed promissory notes, but the orders were always given by her husband, and the correspondence, although conducted in her name, was invariably written and signed by him, without the least communication with her. In truth, her participation in the business was confined to the use of her name, and to signing promissory notes.

I have no doubt that her knowledge of what was taking place went little, if at all, further than the point that her husband was carrying on business in her name until he could safely use his own. In course of time he did obtain his discharge, and he then substituted his own name for his wife's in correspondence and on promissory notes. This

was, indeed, the sole change which the previous mode of carrying on the business rendered necessary. The appellant held notes, which, after the husband's discharge, were renewed by notes made by him and endorsed by her, but, according te the appellant's contention, without affecting her original liability. However that may be, there is no doubt that the balance due by her was transferred to his account by the appellant.

It is upon a balance alleged to be due upon her notes given before her husband's discharge that the appellant's claim is founded. It cannot, I apprehend, be open to serious doubt that in this Province a married woman may, under certain circumstances, make herself liable to be treated as an insolvent. The Legislature probaby took this for granted, when in the 26th section reference is made to the husband of the insolvent.

It is true that this language does not necessarily extend beyond the case of a woman who has been made an insolvent in respect of antenuptial transactions, but if read in connection with the rule established while a *feme covert* was subjeet to her ancient disabilities, that during the coverture she could not be adjudged bankrupt on account of debts contracted *dum sola*, it does not appear to be so limited. Her exemption in fact depended upon her disability, and when that was removed she became liable.

This is well illustrated by *Lovie* v. *Phillips*, 3 Bur. 1776, where the question was, whether a married woman, who was a sole trader in the city of London, was liable to a commission of bankruptcy. The custom, as proved, was that " where a *feme covert* of her husband useth any craft in the said city on her sole account, *whereof the husband meddleth nothing*, such a woman shall be charged as a *feme sole* concerning everything that toucheth the craft, and if the husband and wife shall be impleaded, in such case the wife shall plead as a *feme sole*; and if she is condemned she shall be committed to prison till she has made satisfaction; and the husband and his goods shall not in such case be charged nor impeached." It may be observed

that the complete absence of interference by the husband seems to have been a necessary ingredient.

It was held by Lord Mansfield that there was no reason to take the case out of the Acts relating to bankruptcy, the husband himself not being liable to the creditors, nor having any demand upon them, and the consequences of her bankruptcy, as a sole trader, concerning only the relations in which she stood to her creditors, and they to her.

Mr. Justice Wilson pointedly remarked: "This (the liability) is a consequence of the custom. The custom establishes her being a sole and separate trader: it follows, of course, that these goods in her separate trade may be taken and seized under a commission of bankruptcy against her.

The doctrine also receives illustration from the cases in which a married woman, whose husband has been transported or abjured the realm, has been held liable to be sued as a *feme sole*, and therefore liable to be adjudged bankrupt. It is, therefore, manifest that the liability of the respondent to be placed in insolvency must depend upon the special Provincial legislation, which has been directed towards removing the disabilities of married women.

Great stress was laid in the judgment of the Court below, and in the argument upon the recent decision of the Common Pleas, in *Meakin* v. *Samson*, 28 C. P. 355. That case differs from the present in two distinct particulars. There the contest was between the wife and the husband's creditors; and she was not shewn to be possessed of any separate estate. Here the wife is objecting to the proceedings of her own creditors, and she had separate estate, which was employed as security for the price agreed to be paid for her husband's assets.

While I think that that case was perfectly well decided, I must yield to the appellant's contention that it is not a direct authority upon the present appeal; but it is extremely valuable for the observations it makes upon the proper and necessary constituents of a separate trading by

the wife. It may be conceded that the respondent became the purchaser of her husband's assets, and that it then formed part of her separate estate; but the true question still remains to be solved, and that is, whether she so employed it in trade as to make herself a trader within the meaning of the Insolvent Act. I am of opinion that the evidence proves that she did not make herself a trader, and that instead of carrying on a trade separate from her husband, she allowed him to use her separate estate in a business which was really his own.

While the Provincial Statute protects her in the enjoyment of her separate property, and places it beyond his control or disposition without her consent, and while it provides that all proceeds or profits from any occupation or trade which she carries on separately from her husband shall be free from his debts or disposition, and shall be held and enjoyed by her, and disposed of without her husband's consent as fully as if she were a *feme sole*, it does not prevent her from permitting him to carry on trade with her property upon such terms as she thinks proper.

It seems to me that it would be preposterous to say that she was carrying on a trade separately from her husband, simply because she consented to pledge her separate estate, and to give the use of her name in order to enable her husband to carry on business; and that is the whole sum of the evidence against her.

I feel perfectly safe in holding that the Legislature never intended the protection of the 7th section of the statute to extend to such a case. I therefore rest my judgment entirely upon the conclusion that, granting the stock-in-trade to have been her separate property, she never employed it in trade separately from her husband, and was never herself in any sense a trader. As the owner of separate estate she was liable to be sued, but she was only subject to be placed in insolvency if she were a trader. This I hold she never became, and I must therefore dismiss the appeal, with costs.

Appeal dismissed.

RE PARSONS, AN INSOLVENT.

Insolvent Act of 1875—*Secs.* 28, *sub-sec. b, and* 125—*Summary jurisdiction —Sale by auction of insolvent's interest in mortgage—Sections* 38, 67, *and* 75.

The summary jurisdiction of the Insolvent Court under sections 28, sub-sec. *b*, and 125, only applies to creditors who are entitled to prove on the estate, or to persons who have an interest in the assets of the estate.

The Insolvent Court has no jurisdiction to entertain a petition by a purchaser, who is not a creditor, to recover from the assignee a deposit paid upon a purchase at auction of the insolvent's estate.

It was objected that the sale of the insolvent's interest in a mortgage made to him and another, was invalid, as the assignee had not followed the conditions prescribed by either section 75 (as amended), or section 67 of the Insolvent Act of 1875.

Held, that such an interest is not "real estate" within the meaning of section 75, that section 67 did not apply to the sale of a single asset, such as a mortgage; and that the sale was within section 38, under which the assignee had acted, and with which under the circumstances set out below, he had sufficiently complied.

THIS was an appeal from the County Court Judge of York, sitting in insolvency, who refused to entertain a petition by which the appellant sought to recover from the assignee a deposit upon a purchase at auction of part of insolvent's estate.

The facts appear in the judgment.

The case was argued before Moss, C. J. A., sitting alone in insolvency, on the 1st January, 1879.

D. E. Thomson, for the appellant. The County Court Judge had jurisdiction: sec. 28, sub-sec. 6, and sec. 125 of the Insolvent Act of 1875; *O'Reilly* v. *Rose*, 18 Gr. 33; *Skinner* v. *McLeod*, 2 Pugsley 131. The assignee did not take the steps necessary to entitle him to sell under sec. 67, and consequently cannot convey a title. Hence the appellant is entitled to a return of his deposit: *Casson* v. *Roberts*, 31 Beav. 613; *Gosbell* v. *Archer*, 2 A. & E. 500; *Palmer* v. *Temple*, 9 A. & E. 508. The respondent is not protected by the conditions of sale: *Symons* v. *Jones*, 1 Y. & C. C. C. 490; *Taylor* v. *Martindale*, 1 Y. & C. 661; *Seaton* v. *Mapp*, 2 Coll. C. C., per V. C. Bruce, at 562; *Greaves* v. *Wilson*, 25 Beav. 290; *Swaisland* v. *Dearsley*, 29 Beav. 430.

Ferguson, Q. C., for the respondent. The summary jurisdiction of the Insolvent Court applies only as between assignee and creditors, and has no reference to outside parties, as the appellants are: *Crombie* v. *Jackson*, 34 U. C. R. 575; *Dumble* v. *White*, 32 U. C. R. 601; *Burke* v. *McWhirter*, 35 U. C. R. 1; *Archibald* v. *Haldan*, 30 U. C. R. 30. The assignee refers to section 38, under which he sold. Such an action as this cannot be maintained against a sheriff: *Kero* v. *Powell*, 25 C. P. 449; *Lethbridge* v. *Kirkman*, 25 L. J. N. S. 89.

April 18, 1879. MOSS, C.J.A.—This matter comes before me upon appeal from the County Judge of York, sitting in insolvency. Although the parties are not quite agreed upon some minor facts, I think there is no dispute upon any point really material to the controversy. The appellant claims to recover from the respondent, who is assignee of the insolvent estate of William Parsons, a sum of money paid as a deposit upon a purchase at auction of the interest of the insolvent In a mortgage upon real estate made by one Wright to the insolvent and one Henry Parsons, asserting that the respondent cannot make a good title. The peculiarity of his contention is, that he does not object to the title of the insolvent, but he denies the power of the assignee to sell under the circumstances.

As I gather from the evidence, the creditors of the estate have shewn little or no interest in its management, but have left it to be dealt with by the assignee according to his own discretion. From what is stated. I infer that although the regular meetings appointed by the statute were duly convened, no creditor took the trouble of attending. At any rate it is clear that no inspectors to the estate were ever appointed. Finding the mortgage among the assets of the estate the assignee called a meeting of creditors for the purpose of authorizing its sale, but no one attended. He states, however, that he procured the assent of a large majority of creditors, both in number and value, to his proceeding to sell. Accordingly he advertised with

all reasonable pubiicity that the interest of the insolvent would be sold by public auction, and at this sale the appellant became the purchaser at the price of $1,025. A memorandum of agreement was signed, which recited that the assignee, having read the advertisement of the sale, stated at the same time that he sold only the insolvent's interest in the property, be that what it might, and that he would undertake no responsibility as to title or anything else. Upon proceeding to investigate the title, the purchaser's solicitor objected that the assignee was not authorized to sell and could not convey the insolvent's estate, because he had not taken the steps prescribed by sec. 67, or those prescribed by sec. 75 of the Insolvent Act of 1875, as amended. The validity of this objection in point of law being contested, the purchaser applied upon petition to the Insolvent Court for a return of his deposit, and that application having been refused, he has now appealed.

The first question raised is, whether the Insolvent Court is the proper tribunal. The appellant relies upon sec. 28, sub-sec. *b*, which makes the official assignee an officer of the Court, and as such subject to its summary jurisdiction, and accountable for the money, property, and estates, coming into his possession as such assignee, in the same manner as sheriffs and other officers of the Court are; and upon sec. 125, which enacts that the performance of his duties may be compelled, and full remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property upon, in or to any effects or property in the hands, possession or custody of an assignee, may be obtained by an order of the Judge, or summary petition, and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever. The latter section is identical with sec. 50 of the Act of 1869, which has frequently formed the subject of judicial consideration.

In *Archibald* v. *Haldan*, 30 U. C. R. 30, it was held that the enactment applied to persons who could prove on the

estate. In the subsequent case of *Burke* v. *McWhirter*, 35 U. C. R. 1, it was pointed out by Wilson, J., that the expressions used in the section indicate that the person making the claim, or seeking the remedy, is a creditor or claimant upon the estate. In *Henderson* v. *Kerr*, 22 Gr. 91, Blake, V. C., expressed the opinion that in every case in which the Insolvent Court can work out all the rights and remedies of persons having claims against the estate, it is bound to work out complete justice between the parties, but that beyond this the Insolvent Court cannot go, and cases not brought within that rule are outside of its jurisdiction. This construction was adopted by Spragge, C., in *Cameron* v. *Kerr*, 23 Gr., 374. Applying that principle, it seems to me to shew that the learned Judge rightly refused to entertain this petition. He was not in a position to do complete justice between the parties. No intelligible reason could be assigned for his dealing with this case, and declining to interfere, whenever the right of the assignee to a specific performance of a contract of sale made by him of a portion of the insolvent's estate is contested. The Insolvent Court does not possess the machinery for readily determining disputed questions of title; even if its opinion be in favour of the validity of the title, can it compel the purchaser to complete? Without accumulating English authority, I may observe that the very recent decision in *Ex parte Brown*, (as noted in the W. N. of 5 Apl. 1879,) shews that the Bankrupt Court would not deal with a suit for specific performance brought by or against the assignee.

It was urged, however, that the case of *O'Reilly* v. *Rose*, 18 Gr. 33, approached the present case, and that it was an authority in favour of the appellant's view; but I do not so read that decision. The bill was filed by a creditor on behalf of himself and all other creditors of an insolvent to prevent an assignee from carrying out a sale, which he had made. The learned Vice-Chancellor thought that the 50th section gave the County Court jurisdiction, and that a resort to Chancery in the first instance was unnecessary, and should not be sanctioned. This appears to me to be

no more than an application of the recognized doctrine that the Insolvent Court is a sort of domestic forum in which disputes between creditors themselves, or between them and the assignee, are generally to be settled. No one doubts that the proper remedy of creditors, who desire to make the assignee discharge his duty, is to be found in the Insolvent Court, and that seems to have been the real object at which the plaintiffs were aiming by their bill.

The enlargement of the jurisdiction introduced by sec. 28, sub-sec. 16, of the Act of 1875, does not in my opinion extend to the present case. That provision does make him an officer of the Court, and accountable for the moneys, property, and estate coming into his possession as such assignee in the same manner as sheriffs and other officers of the Court are; but this means accountable at the instance of a person entitled to demand the assistance of the Court.

That class comprises those only who have the right to make themselves parties to the proceedings in insolvency, which right the appellant, in my opinion, did not possess. The accountability of the assignee which the section contemplates is not one to a purchaser who makes a deposit, but to a person who has an interest in the assets of the insolvent estate; and the remedy provided is not to enable the complainant to receive a payment out of the estate, or to compel the assignee by execution to pay personally, but to enforce obedience by attachment and other process for contempt.

For these reasons I am of opinion that the learned Judge was right in rejecting the application; but I also concur in the correctness of his opinion that the objections to the assignee's right to transfer were not well founded. The argument is, that this sale must be warranted by the 75th section (as amended), or by the 67th section, and that the conditions have not been observed, upon which the assignee's authority to sell under either section depends.

The 75th section prescribes the mode of selling "the real estate" of the insolvent. I think it too clear for argument

that his interest in this mortgage was not real estate, within the meaning of the section. He was simply entitled to half of a debt, which was secured upon realty.

The 67th section provides that if the assignee, after having acted with due diligence in collection, finds there remain debts due, the attempt to collect which would be more onerous than beneficial to the estate, he shall report to the creditors or inspectors, and with their sanction he may sell the same by public auction, after such advertisement as they may order, and pending such advertisement, he shall keep a list of the debts to be sold open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts; but all debts amounting to more than $100 shall be sold separately, except as otherwise provided in the Act. This does not appear to me to be applicable to the case of a single asset, such as a mortgage. I think its object is, to provide for a case in which there has been a number of commercial or business debts, some of which the assignee has not been able to realize. There, instead of the assignee making further attempts at collection, which might occasion useless expense and great delay in winding up the estate, a sale is authorized under certain conditions.

In this particular case the assignee seems to me to have proceeded under the 38th section, and to have exercised the power thereby conferred in a reasonable and proper manner. Apart from the informal assent of the large majority of the creditors, to which I have already referred, it seems to me that none of them could, under the circumstances, be heard to impeach the action of the assignee. After their inaction; after the failure of the assignee's attempts to secure a meeting; after their practically leaving the realization of the estate to his discretion, and after their tacit acquiescence in his plan of disposing of this particular estate, the Court would not readily listen to any complaint on their part that their consent had not been obtained.

Such an application, to have had any prospect of success,

must have been promptly made, and delay would be quite fatal. It is clear, I think, that the creditors considered the sale an advantageous one, and that not one of them had the least intention of objecting to its completion. It seems still clearer that no such contention by a creditor could now prevail.

I think the appeal should be dismissed, with costs.

Appeal dismissed.

RE CLEVERDON.

Insolvent Act of 1875—Insolvent firm—Surplus estate—Division of—Lien for advances by partner—Interest.

On the insolvency of the firm of C. & Coombe the requisite proportion of creditors granted C. his discharge, and sold him the insolvent estate at a certain price, for which he gave his promissory notes payable at intervals. Shortly afterwards he entered into partnership with one M., and a memorandum was executed by them, by which they agreed that this estate should form their stock-in-trade, and become their property equally, and they equally assumed the liability for the amount of the composition notes. While the greater part of these notes was still unpaid, they made an assignment in insolvency. From their assets sufficient was realized to pay their partnership creditors in full, and leave a surplus. During the partnership of C. & M., M. had advanced $500 to the firm, and C. had drawn out of the business $88.26 in excess of his share. The creditors of C. claimed that the whole of the surplus should be applied toward the payment of the composition notes; but, *Held*, that M. was first entitled to be paid the $588.26 with interest upon the $500, as that was a loan to the firm, but no interest upon the overdraft; and that C., and through him, his creditors had a right to insist upon the composition notes being paid before any of the residue of the surplus was divided between C. & M.

THIS was an appeal by the creditors of Cleverdon & Coombe from a decision of the County Court Judge of the County of York, sitting in insolvency, whereby he divided the surplus estate of the insolvent firm of Cleverdon & Martin between the two partners. The material facts are stated in the judgment.

The case was arued on the 7th January, 1878, before Moss, C. J. A., sitting alone in insolvency.

J. K. Kerr, Q. C., (*W. Redford Mulock* with him), for the appellant.

Bain, for the respondent.

M. Clarke, for the inspectors of the estate of Cleverdon & Martin.

MOSS, C. J. A.—The peculiar feature of this case is, that it deals with the mode of dividing the surplus estate of an insolvent firm. There were two partners, Cleverdon and Martin, and all the firm creditors having been paid, a dispute has arisen between Martin, who is personally solvent, and the creditors of Cleverdon. The learned Judge of the County Court found a solution of the difficulty by simply dividing the fund equally between the contending parties. I am not apprised of the views which led to this mode of settling the controversy, and I confess that I have not succeeded in discovering the precise principle upon which he proceeded. On the one hand, the assignee of Cleverdon contends that he is entitled to the whole fund, by reason of certain equities between the partners. On the other, Martin alleges that he is entitled to receive a sum exceeding $600 as a first charge upon the fund, and that the divisible surplus is what remains after satisfaction of this lien. I do not know what opinion the learned Judge formed upon any of these questions. It may be, as he divided the whole surplus into equal portions, he did not consider them material. But whatever was the process he adopted, I am of opinion that, in the actual result, his settlement of the dispute was not very wide of the mark.

All the facts, which I deem important to the formation of a judgment, may be succinctly stated. Cleverdon was carrying on business in partnership with a person named Coombe until July, 1876, when the firm became insolvent. On the 11th of December of the same year, a deed was executed by the requisite proportion of creditors, assigning

the insolvent estate to Cleverdon alone, at the price of sixty-five cents on the dollar of all the proved claims, and granting him an absolute discharge. Coombe neither was a party to, nor derived any benefit under this instrument.

In the payment to each creditor of the amount of his proved claim, Cleverdon gave him four promissory notes, payable at intervals. At this time he and Martin were probably engaged in negotiations for the formation of a partnership, and on the 18th of December they executed a memorandum, by which they agreed to become partners, and that the stock-in-trade, estate, and effects, of the estate of Cleverdon & Coombe, purchased by Cleverdon, should form the stock-in-trade of the firm, and become their property equally; and that they should equally assume and become liable for the amount of the purchase money or composition notes. Under this agreement they carried on business until the 6th of December, 1877, when they were placed in insolvency. The greater part of the composition notes given by Cleverdon are unpaid. During the continuance of the partnership Martin advanced, by way of loan, and for the purposes of the firm, the sum of $500, and Cleverdon has drawn out of the moneys of the business the sum of $88.26 in excess of his proper share. The assets having been realized, and the partnership creditors paid in full, there remained a surplus of about $1,300, whereupon Martin presented his petition, claiming to be entitled to payment of the two sums of $500 and $88.26, with interest, and the half of the residue. On behalf of the creditors of Cleverdon, it was contended that the whole of the surplus should be applied towards the payment of the composition notes.

It will be observed, therefore, that the equal division of the fund directed by the order, against which this appeal is brought in the interest of these creditors, approximates pretty closely to the correct result, if Martin should be held entitled to no more than the $588.26, with interest on the $500 actually advanced. I am of opinion that this is the full extent of his rights. That seems to be the view

which he has himself taken, for he is not dissatisfied with the order.

It cannot be disputed, that in the absence of any countervailing equity, Martin would, as against his co-partner, be entitled to a lien for that sum. It is equally elementary law that the separate creditors of Cleverdon can only take his share of the surplus after satisfaction of that lien; and that if Martin had separate creditors they would be entitled to the benefit of the lien, and in respect of it enjoy priority of proof against the joint estate over the separate creditors of Cleverdon. But the contention of the appellants is based upon an equity supposed to be created by the agreement between the partners. That was an agreement to which the creditors of Cleverdon were in no sense parties. They had been content to dispose of the estate upon receiving his personal security, and he was at liberty to make such subsequent arrangements as he pleased. He stipulated with Martin that they should be equally liable for the amount of the composition notes, but that gave the creditors no independent personal rights. They could, at most, assert an equity through the medium of Cleverdon, and could succeed to no higher position than he occupied.

Now it seems to me, beyond the reach of argument, that there is nothing in the agreement which could give Cleverdon any right, legal or equitable, against the money which his co-partner had advanced. Such an advance was not within the contemplation of the agreement, and in respect of it Martin stood in the same position as a stranger, with the sole limitation that he could not come into competition with his own creditors. The suggestion was not even hazarded that Cleverdon could assert a claim under the guise of a set-off. Upon the winding up of the partnership equity would, no doubt, withhold from Martin any share of the ultimate surplus until the composition notes were paid. As between him and his partner, he might well be treated as having created a charge, which precluded him from demanding his share of the ultimate surplus while these liabilities remained unpaid. But this could

not be extended to the sums in question. He or his separate creditors were entitled to receive them out of the joint estate in priority to the separate creditors of his partner. In truth there was, properly speaking, no surplus until these demands were satisfied.

The cases cited in support of the appeal are in complete harmony with this view. In *Ex parte King*, 17 Ves. 115, one of two parties had drawn bills of exchange in the name of the firm for his separate debt. These having been proved, the separate creditors of the other claimed a lien upon his share of the surplus of the joint estate in respect of that proof. The Lord Chancellor held that the separate creditors of a partner could have nothing but what he could have; and that the separate estate of the partner who had drawn the bills consisted of that part of the effects which should remain after the demands of his partner upon the partnership were satisfied. *Ex parte Reid*, 2 Rose 84, was a case in which two persons, Bland and Saterwaite, were in partnership, the latter being a dormant partner. A joint commission having issued, and Bland's separate estate being considerable, joint creditors exercised their right of proving against it, as he was the ostensible partner. The result was, that his separate estate was diminished, and the joint estate produced a surplus. The separate creditors petitioned that the surplus of the joint estate might be considered as his separate estate, and distributed among them accordingly, and it was ordered that in taking the accounts, credit should be given to Bland for the amount of dividends paid out of his separate estate to the joint creditors who elected to come in against it. These cases shew the equitable principles upon which the Court proceeds in administering the surplus of bankrupt estates, and that the surplus finally divisible between the partners is reached after the liens belonging to each are satisfied. Nor does the case of *Holderness* v. *Shackels*, 8 B. & C. 612, upon which much reliance was placed by the appellants, lend any real support to their position. It only decided that where the assignees in bank-

ruptcy of one of three part owners of a ship, engaged in the whale fishery, brought trover against another part owner for certain casks of oil which had been set apart as the share of the bankrupt, and were in the warehouse of the defendant, there was a subsisting lien for the bankrupt's share of the disbursements of the ship. That decision rests upon a perfectly plain principle, which is thus stated by Bayley, J., at p. 620: "Where there is a joint adventure which produces certain goods, the proper course is, first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled respectively." It would require much ingenuity to construe this language as affirming the proposition that there was a lien created upon Martin's advance in favour of the holders of the composition notes by his agreement with his co-partner that these liabilities should be assumed.

It was, indeed, urged that as the original stock-in-trade of the firm belonged to the creditors of Cleverdon and Coombe, it was only equitable that the surplus, which owed its existence to these assets, should be charged with payment of their claims. One obvious and sufficient answer to this agreement is, that there were no creditors of Cleverdon and Coombe, for they were all satisfied by the acceptance of the composition notes.

But I am of opinion that Cleverdon would have had, and that through him his creditors now have, a right to insist that the surplus after deducting the amount of Martin's lien should not be divided until the composition notes are paid. It would be contrary to the equitable principles upon which bankrupt estates are administered to permit him to withdraw a larger share than would remain to Cleverdon after the satisfaction of the liabilities they had agreed, as between themselves, jointly to assume. These notes being more than the whole residue, it follows that Martin is only entitled to receive $588.26 principal. As the $500 was really a loan to the firm he is entitled to

interest upon that sum, but not upon the overdraft. The requisite calculation may be made by the registrar and the order varied accordingly.

As the appellants have substantially failed, they must pay the costs of the appeal.

IN RE BOUCHER.

Habeas Corpus—Appeal from judge sitting for the court—29 & 30 Vic. 45, R. S. O. ch. 38, sec. 18—Malicious wounding—Felony—Misdemeanour—Form of conviction—32 Vic. ch. 20, D.; 38 Vic. ch. 47, D.

An appeal does not lie to the Court of Appeal from a decision of a Judge sitting for the Court out of Term, on a motion to discharge a prisoner on habeas corpus, under either 29 & 30 Vic. ch. 45, or R. S. O. ch. 38, sec. 18.

The conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly with intent to do her grievious bodily harm."

Held, affirming the judgment of the Queen's Bench, that if not sufficient to charge a felony under sec. 17 of 32 Vic. ch. 20, D.. it was a good conviction for a misdemeanour under sec. 19, the unnecessary statement of the intent being immaterial. The police magistrate has jurisdiction under the constitution to try either of these offences.

THIS was an appeal from a decision of Hagarty, C. J. Q. B., discharging a rule *nisi* calling upon the Attorney-General to shew cause why the prisoner should not be discharged, reported 8 P. R 21.

The appellant was convicted before the Police Magistrate for Ottawa of unlawfully and maliciously wounding Mary Kelly, with intent to do her grievous bodily harm, and was sentenced to be imprisoned for a year at hard labour in the Central Prison. On the 20th of March last a writ of *certiorari* was issued out of the Court of Queen's Bench, directed to the Police Magistrate and the Clerk of the Peace, who duly returned the depositions and

other proceedings in their custody. On the 22nd of March the prisoner's counsel moved before the Chief Justice of the Queen's Bench, sitting for the Court out of term, for the issue of a a writ of *habeas corpus*, and a rule *nisi* calling upon the Attorney-General of the Province to shew cause why the prisoner should not be discharged. The writ was granted and issued, being marked in the usual manner *per statutum*, &c., and having a marginal note that it was issued from the office of the Clerk of the Crown and Pleas, Queen's Bench, pursuant to rule of Court made the 22nd day of March, 1879. On the 24th March cause was shewn by counsel for the Crown before the Chief Justice sitting in Court, and the rule *nisi* discharged and the prisoner remanded. A formal rule to this effect was drawn up, dated the 25th March, signed by the Clerk, and purporting to be the act of the Court. It was headed: "In the Queen's Bench. Before the Honourable the Chief Justice Hagarty." Against this rule the prisoner appealed.

The case was argued on the 14th of May, 1879 (*a*).

Upon the appeal being opened, *Scott*, Q. C., for the Crown, objected to the jurisdiction.

W. W. Ward, for the prisoner, contended that jurisdiction to hear the appeal was conferred on the Court of Appeal by the R. S. O., ch. 38, sec. 18, and section 20th of A. J. Act. 1873.

May 15, 1879 (*a*). MOSS, C. J. A.—By 29 & 30 Vic. ch. 45, sec. 6, the Parliament of the then Province of Canada enacted that in case any person confined or restrained of his liberty is brought before the Court in term time upon a writ of *habeas corpus*, and is remanded, such person may appeal from the decision or judgment of the said Court to the Court of Appeal. It is obvious that this in itself does not give the Court jurisdiction to entertain the present appeal. The prisoner was not

(*a*) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

brought before the Court in *term* time, and that is the only case with which the enactment deals. Reliance, however, is placed upon the provisions of the statute constituting the Court of Appeal, and of the Administration of Justice Acts. By R. S. O. ch. 38, sec. 18, it is declared that "the Court shall have an appellate jurisdiction in both civil and criminal cases; and that an appeal shall lie from every judgment of any of the Superior Courts, or of a Judge sitting alone as and for any such Courts in a cause or matter depending in any of the said Courts, or under any of the powers given by the Administration of Justice Act." It is argued that this is a judgment of a Judge sitting alone for the Court of Queen's Bench, and is appealable. The next enquiry, therefore, is, whether this is such a judgment. By the 21st sec. of the Administration of Justice Act of 1873, it was provided that the Judge might sit separately either in or out of term for the hearing and disposing of such matters, and the transaction of such business as might from time to time be directed by general rules or orders, and that the judgments, decrees, rules, and orders made by a single Judge should have the force and effect of, and be deemed for all purposes to be, the judgments, decrees, &c., of the Court. In the succeeding session it was enacted (37 Vic. ch. 7, sec. 19, O.) that one Judge should sit in open Court every week as well in as out of term, for the purpose of disposing of all Court business which *may* be transacted by a single Judge; and that (sec. 17) all matters which, according to the law or practice theretofore prevailing, have been heard in the Court of Queen's Bench or Common Pleas, before the full Court in term, are with certain exceptions to be heard and disposed of in the first instance by a single Judge. It is under the powers thus conferred that we are asked to hold that the decision of the Chief Justice of the Queen's Bench is equivalent to a decision of the Court in term. We are unable to arrive at that conclusion. The Provincial Legislature, in making these special provisions for the transaction of the business of the Courts, was only dealing with civil controversies.

This is, we think, quite apparent from the language used, and from the whole scope of the Acts. Indeed, to extend these provisions to such a case as the present, would be to alter criminal procedure, over which the Provincial Legislature has no jurisdiction. The Chief Justice, of course, had jurisdiction to order the issue of the writ of *habeas corpus*, and to refuse to discharge the prisoner, but this was by virtue of his judicial office, and not under any of the powers conferred upon a Judge by Ontario legislation. None of these made, or could have made, him the equivalent of the full Court, for the purpose of determining whether a person suffering imprisonment under a conviction for a criminal offence is entitled to be discharged.

It follows that the prisoner cannot resort to this Court unless the Court of Queen's Bench sitting in term shall see fit to refuse his discharge, and that it is our duty to quash the present appeal.

Appeal quashed.

Subsequently an application for the discharge of the prisoner was made to the Court of Queen's Bench sitting in term, and was refused.

From this decision the prisoner appealed.

The case was argued on the 20th of May, 1879 (*a*).

W. W. Ward, for the prisoner. The magistrate had no power to award a longer sentence than six months with hard labour, as that is the heaviest sentence he can impose under 32 & 33 Vich. ch. 32, D. It is clear that the trial took place under this statute, and not under the 38 Vic. ch. 47, as is contended, inasmuch as the information is drawn in accordance with sub-section 3 of section 2 of the former statute, and not with sections 17 or 19 of 22 & 33 Vic. ch. 20. The depositions were also headed in the manner directed by 32 & 33 Vic., ch. 32. It is submitted that it

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(*a*) *Present.*—Moss, C.J.A., Burton, Patterson, and Morrison, J.J.A.

cannot be held that the indictment is for a felony, since the word "feloniously" is omitted; and if it was intended as an indictment for a misdemeanour, it was so framed as to mislead the prisoner, and is therefore bad: *Regina* v. *Marshall*, 1 Moo. C. C. 158; *Paley* on Convictions, 5th ed. 198; *In re Beebe*, 10 U. C. L. J., O. S. 19; *Regina* v. *Reno*, 4 P. R. 261; *In re Slater*, 9 U. C. L. J., O. S. 21. The Dominion Parliament had no authority to pass an Act giving the police magistrate power to try this offence: B. N. A. Act, sec. 01, sub-sec. 27; sec. 92, sub-sec. 14; *Re Goodhue*, 19 Gr. 453; *Regina* v. *Whelan*, 28 U. C. R. 2, 108; *Regina* v. *Lawrence*, 43 U. C. R. 173; *In re Bates*, 40 U. C. R. 284.

Scott, Q.C., for the Crown. The Court below disposed of this matter on the ground, that if the conviction was a good conviction for a felony, then the prisoner was properly convicted and properly sentenced; if not, then that he was properly charged with a misdemeanour, and properly sentenced, as the statement of the intent was surplusage. Under section 17 of 32 Vic. ch. 20, the insertion of the word "feloniously" is a mere matter of form, as the words, "with intent then and there to do her grievous bodily harm," sufficiently shew the felonious intention. The offence was one under chapter 20 of 32 & 33 Vic., D., and was properly tried under 38 Vic., ch. 47. It cannot be objected now that the sentence was not authorized by the statute, as all the Court has to do on this application is to see that the warrant was regular, since the motion is to discharge the prisoner, not to quash the conviction. The Act, 38 Vic., ch. 47, does not attempt to establish a new Court, it merely gives the police magistrate certain powers as an individual. But the Dominion Parliament has authority to constitute such a Court. He referred to *Rex* v. *Judd*, 2 T. R. 255; *Rex* v. *Croker*, 2 Chitty 138; *Russell* on Crimes, vol. 2, p. 392; *Attorney-General of New South Wales* v. *McPherson*, L. R. 3 P. C. 269; *Regina* v. *Hodgson*, 1 Cro. Cas. R. 3; *Regina* v. *Thomas*, 1 Cro. Cas. R. 313.

May 21st, 1879 (*a*). PATTERSON, J. A., delivered the judgment of the Court.

This is an appeal from a decision of the Court of Queen's Bench, remanding the prisoner, who had been brought before that Court on *habeas corpus*.

The prisoner is confined in the Central Prison under a sentence of the Police Magistrate of the city of Ottawa, before whom he was convicted of unlawfully and maliciously wounding one Mary Kelly with intent then and there to do to her, the said Mary Kelly, grievous bodily harm, contrary to the form of the statute in such case made and provided.

For this the prisoner was sentenced to be imprisoned in the Central Prison at Toronto, and there kept at hard labour for the space of one year.

This is a sentence which could only be passed by the Police Magistrate under the Act of 1875, 38 Vic. ch. 47. We must therefore refer to that Act to ascertain if the sentence is lawful.

The first section enacts that "in case any person is charged in Ontario before a Police Magistrate * * with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, * * such person may, with his own consent, be tried before such Magistrate, and may, if found guilty, be sentenced by the Magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions."

The offence for which this prisoner is convicted is clearly one for which, under the Statute of 1869, 32 & 33 Vic. ch. 20, he might have been tried at a Court of General Sessions of the Peace.

Sec. 17 of that Act declares that whosoever unlawfully and maliciously, by any means whatsoever, wounds or causes any grivous bodily harm to any person, or shoots at any person, or, by drawing a trigger, or in any other

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J J. A.

manner, attempts to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, * * is guilty of felony. And sec. 19 makes it a misdemeanour to unlawfully and maliciously wound or inflict grievous bodily harm upon any person either with or without any weapon or instrument. A conviction under either of these sections renders the convict liable to a sentence such as that now in question.

It is argued that the present conviction is not for a felony under section 17, because although it follows the language of the section, it does not charge the act to have been done feloniously. We need not decide how this is, because it is plain that if not sufficient to charge a felony under section 17, the conviction is a good conviction for the misdemeanour under section 19. We agree with the view expressed by Hagarty, C. J., when the prisoner was before him, that the unnecessary statement of the intent, &c., does not interfere with the effect of the conviction as a good conviction for unlawfully and maliciously wounding. There is thus before us a conviction and a warrant clearly within the jurisdiction of the Magistrate, and regular upon their face.

The contention before us has been that this conviction was improperly made, or the sentence improperly passed, because the nature of the proceedings confined the power of the Magistrate within the limits prescribed in the Act of 1869, 32 & 33 Vic. ch. 32, sec. 17, under which he could not sentence to imprisonment with hard labour for a longer term than six months. This is an objection which would be more properly raised upon a motion to quash the conviction, which was not the form of the application to the Court of Queen's Bench. But there does not appear to be any foundation for it. It is attempted to be supported chiefly because in the original information the prisoner was charged with having *cut* and wounded the prosecutrix; and as the word *cut* does not occur in either secs. 17

or 19 of the Act of 1869, ch. 20, but does occur in sub-sec. 3 of sec. 2 of ch. 32, it is urged that the proceeding must be taken to have been under the latter Act, or that at all events the prisoner may fairly be taken to have supposed he was charged under that Act, and therefore to have consented to be tried only for an offence which would subject him, at the farthest, to six months' imprisonment at hard labour.

Looking at the original information, we find the charge that the prisoner "did unlawfully cut and wound Mary Kelly with intent then and there to do her grievous bodily harm." Now, if we credit the prisoner with having critically examined the wording of the charge, and having applied to it an accurate knowledge of the statutes, which is the hypothesis on which the argument rests, we must conclude, not that the presence of the words "cut and" induced him to assume he was being dealt with under chapter 32, but that from the fact that the cutting and wounding was charged as having been done with the intent which under sec. 17 of ch. 20 constitutes the felony, he must have known that the Magistrate had no jurisdiction over the offence except under the Act of 1875, because the Act of 1869, ch. 32, sec. 2, sub-sec. 3 does not contain those words, or any words of equivalent import.

The form of the proceedings, which is that prescribed by chapter 32, was also pointed to as calculated to assure the accused that he was being tried under that Act; but the Act of 1875 expressly directs, in sec. 2, that the proceedings upon and subsequent to the trial under its provisions shall be, as nearly as may be, the same as upon a trial under the earlier Act.

Then we find that, whatever inference it was possible to draw from the use of the words "cut and" in the information as sworn on 10th January, those words were cancelled on 16th January and the charge made that the accused did "unlawfully and maliciously wound," &c., in which shape the information was resworn, and the subsequent proceedings were upon the charge as so amended.

One other point was made on behalf of the prisoner, which is undoubtedly one of importance. It was contended that the assignment of the jurisdiction to try this offence to the Police Magistrate was unauthorized by our Constitution, the Magistrate being appointed by the Provincial Government and under the authority of a Provincial Statute. This was put as a violation either of section 91, sub-sec. 27, of the British North America Act as being legislation by the Local Legislature respecting Criminal Law, or the procedure in criminal matters; or of sec. 92, sub-sec. 14, as being an assumption by the Dominion Parliament to constitute a Court of criminal jurisdiction in the province. It seems unnecessary to discuss this objection at any length, as we have the concurrent Act of both Legislatures, the Court being constituted by the Statute of the Province, and the jurisdiction over the offence assigned to it as an existing tribunal by the laws of the Dominion.

We dismiss the appeal.

Appeal dismissed.

NISBET V. COCK.

Chattel mortgage—Affidavit of bona fides—Omission of signature of Commissioner.

When the signature of the Commissioner to the affidavit of *bona fides* to a chattel mortgage was omitted through inadvertence the instrument was held invalid as against a subsequent execution creditor, although it was satisfactorily proved that the oath was in fact administered.

This was an appeal from the judgment of the County Court of the County of Ontario, holding that the chattel mortgage in question was invalid as against a subsequent execution creditor, owing to the magistrate before whom the affidavit of *bona fides* was sworn having unintentionally omitted to sign his name. It was proved that the oath was administered, and that the omission was due to forgetfulness on the part of the magistrate, who swore that he perfectly recollected swearing the mortgagee to the affidavit.

The case was argued on the 11th May, 1879 (*a*).

C. H. Ritchie, for appellants. The only question to be determined on this appeal is whether a chattel mortgage given in good faith and duly registered is void as against an execution creditor of the mortgagor, by reason of the person administering the affidavit of *bona fides* unintentionally omitting to subscribe his name to the jurat. The evidence establishes the *bona fides* of the chattel mortgage, and also shews conclusively that the oath was in fact administered. The learned Judge of the County Court in holding the chattel mortgage invalid, based his judgment on the ground that perjury could not be assigned on such an affidavit. If this be the true test as to the validity of the chattel mortgage, then it is submitted that the mortgage should be held to be valid. In *Bill* v. *Bament*, 8 M. & W. 317, Alderson B. expressed a clear opinion that perjury could be assigned on an affidavit, even though the Commissioner

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(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J.J.A.

had not subscribed his name, and this opinion has been expressly confirmed in *Regina* v. *Atkinson*, 17 C. P. 295. *Ex parte Heyman*, L. R. 7 Ch. 488, which will probably be relied on by the other side, cannot be regarded as an authority in favour of respondent, since the judgment proceeds on the erroneous assumption that perjury could not be assigned. All that the statute requires is, that an *affidavit* by the mortgagee should be filed with the mortgage. An affidavit is defined to be "an oath in writing, sworn before some person who hath authority to administer such oath." *Tomlin's* Law Lexicon. The jurat is not an essential part of an affidavit: *Rex* v. *Hailey*, 1 C. & P. 258. See *Doe dem. Macfarlane* v. *Lindsay*, Draper 123. In *Bill* v. *Bament*, 8 M. & W. 317, the affidavit was held to be *irregular* only. The fact of the Court holding it to be irregular, and not a nullity, really supports our contention. The class of cases in which it has been held that affidavits could not be received in Court, because of defects in the jurat, cannot be regarded as having any bearing as they all rest on the ground that particular rules of Court had not been complied with. On indictment for perjury it is no defence that the affidavit could not by reason of certain omissions be received in Court: *Russell*, on Crimes, 5th ed., vol. 3, p. 97. The apparent object of the Act is to give notice of the existence of the chattel mortgage, and as the mortgage in this case was received by the clerk, and duly filed, that object has been attained. Although there may be objections sufficient to justify the officer in refusing to register an instrument, yet, if it is received and registered, so that the public have notice of its existence, effect will not afterwards be given to mere formal objections, and it has also been held that affidavits on chattel mortgages are not to be deemed insufficient because of technical defects in jurat: *Moyer* v. *Davidson*, 7 C. P. 521; *Deforrest* v. *Brunel*, 15 U. C. R. 378; *Armstrong* v. *Ausman*, 11 U. C. R. 87. 498; *McGrath* v. *Todd*, 26 U. C. R. 87. The Commissioner should, if necessary, be allowed to subscribe his name now: *Fisher* v. *Hayes*, 5 O. S. 506; *Hollingsworth* v. *White*, 10 W.

R. 619; *Elliott* v. *Freeman*, 7 L. T. N. S. 715. In *Muir* v. *Dunnet*, 11 Gr. 85, it was held that the registration of a mortgage was not invalidated by the mortgagee signing it, and witness subscribing his name after it had been registered. In a recent case in England, an affidavit, though not signed by deponent, was held sufficient: *In re Howard and Ashcroft*, L. R. 9 C. P. 347. Where there is a *bona fide* security the Court will struggle to uphold it against technical objections: *O'Donohoe* v. *Wilson*, 42 U. C. R. 329. It may be said that sound policy requires the affidavit should be subscribed by the officer administering the oath, so as to give notice that the mortgagee has pledged his oath as to the truth of the facts stated therein, but this, it is submitted, is a matter for the Legislature. The Act requires an affidavit, but does not say that it should be subscribed by the commissioner, and in the absence of such a provision the Court should uphold the chattel mortgage.

J. K. Kerr, Q.C., for respondent. The paper writing purporting to be an affidavit of the mortgagee, is not in truth an affidavit. The jurat is an essential part of every affidavit, and the name of the person administering the oath must be subscribed. If the commissioner's name were omitted, an indictment for perjury would not lie, and this is the true test as to validity. *Ex parte Hayman*, L. R. 7 Ch. 488, is directly in favour of respondent. See, also, *Rex* v. *Hudson*, 1 F. & F. 56. In *Bill* v. *Bament*, 8 M. & W. 317. the Court declined to receive as an affidavit a paper writing to which the commissioner had forgotten to subscribe his name, although it was clearly shewn that the facts had been sworn to. As to definition of affidavit, see *Jacob's Law Dictionary*. To receive as an affidavit a writing purporting to be an affidavit, to which the commissioner had not subscribed his name, would open the door to the perpetration of fraud. Unless the commissioner's name attached he would not after the lapse of time be able to identify the affidavit. *Shaw* v. *St. Lawrence*, 11 U. C. R. 73, and the several cases collected in R. & J.'s Dig. p. 62–63, in which questions as to the sufficiency of affidavits in proof of claims against

Insurance Companies were determined, are applicable here. Unless the commissioner's name were subscribed a person searching in the County Clerk's office, would not be able to tell whether the mortgagee had sworn to the facts or not, and would have no means of ascertaining except by applying to the mortgagee, who might decline to give any information.

May 12th, 1879 (*a*). Moss, C. J. A., delivered the judgment of the Court.

The question presented upon this appeal is, whether the appellant's chattel mortgage is valid against a subsequent execution creditor. The only objection to its sufficiency is, that the affidavit of *bona fides*, has not the name of the Justice of the Peace before whom it was sworn subscribed to the jurat. It is incontestably proved that the oath was in fact administered, and that the defect arose from simple inadvertence. Both the learned counsel displayed much research in collecting the cases which might seem to illustrate the point in dispute, there being no reported decision directly applicable. The learned Judge in the Court below seemed to be of opinion that perjury could not be assigned upon the document, and that this furnished a strong argument against its sufficiency. In support of this view, the respondent referred to the observation of Lord Justice James, in *Ex parte Hayman*, 7 Ch. Ap. 488, while the appellant relied upon the undoubting assent given by Alderson, B., in *Bill* v. *Bament*, 8 M. & W. 317, to the proposition that perjury may equally be assigned upon the affidavit, although the signature to the jurat is omitted. The latter opinion is confirmed by the judgment of the Court of Common Pleas in *Regina* v. *Atkinson*, 17 C. P. 295. But we do not consider this to be an adequate or satisfactory test. The real question is not whether perjury could be assigned, but whether the paper filed with the chattel mortgage is such

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an affidavit as the statute requires. In that enquiry due regard must be paid to the objects which the statute was designed to effect and the mischiefs it was intended to remedy. These have been rendered familiar to all engaged in the study and practice of the law by the explanations of the Courts in many cases. It is sufficient here to say that the Legislature has not been content that a chattel mortgage should be merely stamped with good faith, but has required the mortgagee to pledge his oath to its character. Still further, it has required this oath to be recorded in the form of an affidavit, which must be sworn before one of certain named officers, and must then be filed along with the mortgage. This was obviously for the purpose of enabling creditors to satisfy themselves not merely of the existence of claims against the goods of their debtor, but of the existence of a statement made under the sanction of an oath and in compliance with the terms of the statute. To the attainment of this end it seems indispensable that it should appear that the affidavit was sworn before some officer having authority to administer the oath. It never could have been intended that the creditor should be left at his peril to assure himself by extrinsic evidence of the presence or absence of this requisite. A paper purporting to be an affidavit, but not authenticated as sworn, is quite consistent with the supposition that at the last moment the mortgagee had shrunk from swearing to the necessary statements. We have not overlooked the class of cases in which defects in affidavits have been held immaterial because the object of giving notice had been secured by the actual placing of the instrument on record, although in strictness it should not have been received by the officer. But these decisions depend upon a different principle, which is not applicable here. There the policy of the Act was simply to give to all persons interested notice of the existence of a certain instrument affecting property. Here, as we have already indicated, the creditor is entitled to more. The information to him that there is a chattel mortgage executed by his debtor

falls far short of that to which he is entitled by the Act. We cannot hold that such information is given when he finds with the mortgage a paper which does not appear to have been sworn before any recognized authority, or sworn at all.

It is quite true that the Courts have uniformly manifested a great reluctance to destroy an honest security on account of a slip or omission. We may regret that our decision defeats the appellant's just claim, but we feel that to support it would be to open wide the door to a palpable and dangerous mode of evading the salutary provisions of the statute. What has in this case been the result of innocent mistake, might in another be the offspring of readiness to aid in the commission of a deliberate fraud. It is not a sufficient answer to urge that the absence of the commissioner's name would invite suspicion and provoke attack. The mortgagee would be under no obligation to furnish any information, and it would be highly unreasonable and unjust to force the creditor either to undertake the difficult and often impossible task of satisfying himself that it was not really secure, or to enter upon a suit which would be liable to be defeated by the testimony of a commissioner of whom the creditor had never heard.

The appeal must be dismissed, with costs.

Appeal dismissed.

Re Lincoln Election Petition.

Election trial—Admissions—Counting ballots—Evidence as to how voter voted.

Admissions duly made upon an election trial may be acted upon as evidence of the facts admitted; but admissions as to how certain voters, whose ballots had been lost, voted, made before the Registrar, when both parties were acting under the erroneous assumption that he had power to count the ballots, were held to be not binding.

Where it can be ascertained, by taking into account the number of votes proved by inspection of documents to have been cast for each candidate, and the whole number cast and as a mere matter of calculation that certain persons have voted and for which candidate they voted, these votes may, on this evidence, be counted for the candidate for whom they were cast.

The statement of a voter cannot be received as evidence that he voted or for whom he voted, either by proving statements so made or by calling the voter as a witness.

The petitioner, being bound to establish affirmatively that the party for whom he claims the seat was duly elected, cannot diminish the respondent's majority by the votes of those who have been held not entitled to vote, when owing to the loss of papers and inadmissibility of other evidence it cannot be ascertained for whom they voted.

This was a special case stated for the opinion of the full Court with reference to certain questions that arose on the trial of the petition. The facts are clearly stated in the judgment below.

The case was argued on the 27th November, 1878 (*a*).

Hodgins, Q. C., for the petitioner. The admissions having been made in good faith cannot be withdrawn. There can be no question that counsel have authority to make admissions which they consider for the benefit of their children, and *a fortiori* one acting in the double capacity of counsel and litigant has that power and cannot withdraw it, especially where the Court has acted on it. Even if the registrar could not look at the ballots, he was at liberty to take the admission, and the Court should now act upon it. With reference to the third point stated for

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the decision of the Court, there was evidence that these voters voted. [*Bethune*, Q. C., objected to this question being gone into, as the only question before the Court was, whether the evidence of the voters themselves can be received as to how they voted.] The protection against disclosure in the statute is very stringent. The word "person" in section 32 of 37 Vic. ch. 5, should be read as "voter," and the section should be interpreted to mean "no voter shall be called upon to state how he voted." It would open the door to fraud if voters were permitted to make such a statement. *Ex parte Murphy*, 7 Cowen 153; *People* v. *Cicott*, 16 Mich. 283. The counterfoils in *Stein's* and *Scott's Cases* were clearly identified.

Bethune, Q.C., for the responpent. The registrar had no authority to act on the admissions, and they are therefore not binding. Nowhere in the statute is there any right given to him to look at the ballots: 32 Vic. ch. 21, secs. 28, 37. The Court alone possesses this power. This is the only way in which the Court can determine which candidate has the majority: Rule 17. The petition is filed on behalf of the public, and the petitioner had no power to bind the other electors by any admissions. The only evidence of how a voter voted is the ballot-paper: 37 Vic. ch. 21, secs. 8, 24, 30. Upon the ballots being looked at, some of them might be marked in such a way that they should be rejected, which is a strong reason for not rereiving secondary evidence. The evidence as to how Stein and Scott voted is most unsatisfactory, and in such a case the proof must be positive, as inferences should not be allowed to be drawn as to how a party voted.

Hodgins, Q.C., in reply, It is the universal practice in England to receive admissions that certain votes are bad, and these admissions are considered binding: *Malcolm* v. *Parry*, L. R. 9 C. P. 610; *Stowe* v. *Jolliffe*, L. R. 9 C. P. 734. By virtue of the proceedings before the Registrar, sitting for a Judge, the admissions before him are as binding as those made before a Judge.

December 23rd, 1878 (*a*). Moss, C. J. A.—Upon the first question the material facts may be thus stated:—During the progress of the scrutiny, which was being held by the registrar, certain papers which had been transmitted by the clerk of the crown in Chancery for use upon the trial were stolen, namely: the voters' list for one polling sub-division, the counterfoils for another polling sub-division, and a part of the counted ballots for another polling sub-division. After the discovery of the loss the counsel for the petitioner and the respondent agreed to go over the lists and to make admissions before the registrar, as far as they could, with respect to the manner in which the voters in St. Thomas Ward had voted. These gentlemen shortly afterwards attended before the registrar, who has made the following note of what occurred:—

"Mr. Hodgins," the counsel for the petitioner, "states that in St. Thomas Ward the parties have gone through the list of voters struck off, and have agreed that the following parties have voted as follows." Then there is given a list of 22 persons as having voted for the respondent, and of four persons as having voted for Mr. Neelon, for whom the seat is claimed. "Mr. Rykert consents. The foregoing leaves eleven votes struck off by the petitioner unaccounted for, and four struck off by the respondent unaccounted for." Then follows a list of the names of such voters, and the note proceeds: "The parties state they will further consider the foregoing cases and endeavour to agree as to further votes."

The question is, whether these admissions before the registrar can be properly received by the Court as evidence of how the votes had been cast.

I take it that *prima facie* an admission duly made upon an election trial may be acted upon as evidence of the facts admitted. This is, I understand, a matter of daily practice, and I am not disposed to narrow the limits of a rule which is very convenient, and not, so far as I can perceive, in

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special danger of being abused. If, therefore, we had found that these admissions had been made and acted upon before a tribunal which possessed jurisdiction to examine the ballots in the case of rejected votes, and thence to ascertain the total number properly cast for each candidate, I think we should have paused long before sanctioning their withdrawal. But the case now presented is not of that character. When these admissions were made both parties were acting upon the erroneous assumption that there had been delegated to the registrar the power of examining the ballots and counterfoils and voters' list, and that but for the theft he would have made such an examination, and reckoned the votes. No such power was possessed by the registrar, nor was it any part of his duty to examine and count the ballots. His functions were limited to the determination of the validity of votes objected to, without attempting to investigate for which candidate they were cast. Consequently these admissions could never have been acted upon by the registrar, and as Mr. Rykert sought to withdraw them on the first occasion when the parties again met before that officer, I think they should not now be received by the Court. As my learned brethren are of the same opinion, the first question must be answered in the negative.

The next question relates to four votes, as to which it can be ascertained by computation and otherwise, without resorting to the statements of the voters, that they voted, and for which candidate they voted. Upon this we are asked: can the votes on this evidence be properly counted for the candidate for whom the evidence shews they were cast?

We understand from this that the state of circumstances is such that by taking into account the number of ballot papers given out at the particular polling place; the computation at the close of the poll, and upon the recount, in which all these papers were accounted for; the fact that the whole number, less four, are forthcoming, including the exact number counted for one of the candidates, but leaving

the other short of four; and the fact that the four voters in question received ballot papers; it is certain, as a mere matter of calculation, that the four votes in question must have been given for a particular candidate. That being the case, it appears to us that the counting of these votes will not be opposed to the true intent and spirit of the Act, and we therefore answer this question in the affirmative.

The next question relates to cases in which it cannot be shewn, except by the statements of the voters themselves, either that they voted or for whom they voted. As to these we are asked: can the statement of the voter be received as evidence that he voted or for whom he voted, either by proving statements so made, or by calling the voter as a witness to give evidence?

It must be judicially recognized that the special object of the Legislature in adopting the method of voting by ballot was to protect voters against coercion and intimidation. It is obvious that these influences might equally affect subsequent statements made by an elector with respect to his vote. It would, therefore, in our opinion be repugnant to the whole policy of the Act to admit such statements, either with or without the sanction of an oath. In sec. 132, sub-sec. 2, of the Election Act, the Legislature has shewn its anxiety to guard against the discovery of how a person has voted, until it has been proved that he has voted, and his vote has been declared by a competent tribunal to be invalid. Again, by sec. 115 it is expressly stated that no person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. Although this does not in express terms extend to the case of the voter voluntarily tendering himself as a witness, it is obvious that even in that case he must be subject to cross-examination. We think that this section should, in furtherance of the objects of the Act, be construed as absolutely exclusive of such testimony.

We, therefore, answer this question in the negative.

The next point is this: in two cases in which votes have been held bad, it appears that the Deputy Returning-officer, by omitting to enter on the counterfoil the number of the voter on the voter's list, has made it impossible to identify the counterfoil belonging to the ballot, except by evidence offered, a copy of which is annexed to the special case. The question is, ought the Judge to hold upon that evidence that the counterfoils were sufficiently identified.

The Deputy Returning-officer's statement as to the vote of John F. Stein amounted to no more than that he knew the person, and that he voted late in the day, not more than two or three voting after him, "at all events," but he would not undertake to "say definitely within two or three of where he voted without seeing the papers." Being allowed to look at the counterfoil, he drew the inference that Stein must have been the person to whom the corresponding ballot was delivered. But this is only an inference which he draws from facts which are not themselves clearly established. The other witness who was examined as to this vote, gave as his recollection that Stein voted between half-past four and five o'clock, and that not more than three or four voted after him. It thus appears that the Court is asked to accept as correct a mere inference deduced by the Deputy Returning-officer, through whose mistake the difficulty has arisen. We are of opinion that this is not sufficient proof, but that, without any imputation upon the veracity of these witnesses, it would be exceedingly dangerous to accept it as adequate. We adhere to the opinion which we expressed upon the argument, that there is an absolute failure of proof in Scott's case. This question, therefore, is answered in the negative.

The remaining question is thus proposed: in making the computation to ascertain if Neelon has been duly elected, how shall the Judge deal with the case of voters who have been held not entitled to vote, when by reason of the loss of the papers and from want or inadmissibility of other

evidence it cannot be ascertained if they voted or how they voted?

The solution of this question seems to follow from a consideration of the issue raised. The respondent has been returned as duly elected. The petitioner, in claiming the seat for Mr. Neelon, undertakes to prove that he received the majority of legal votes. That proposition he is bound to establish affirmatively. Where it is sought to diminish the majority of the respondent by a vote, two things must be proved; firstly, that the voter had no vote; and secondly, that he assumed to vote for the respondent. In the case put, the second is incapable of proof, and the petitioner therefore fails to prove that the vote was cast for Rykert and not for Neelon.

ST. JOHN V. RYKERT.

Revisal of Master on questions of fact—Promissory note—Rate of interest recoverable after judgment—Merger.

Circumstances under which the finding of the Master upon questions of fact will be reversed.

Upon the evidence, which is fully set out below, the finding of PROUDFOOT, V. C., that $3000 was advanced by the plaintiff to the defendant upon a mortgage for that amount instead of $500 as contended by the defendant was affirmed, but the Master's finding, which the Vice-Chancellor had adopted that the note for $510 had not been paid, was reversed.

Where a note is made payable at a large rate of interest *till paid* the holder is entitled to enforce payment with interest at that rate until judgment on an action thereon; but after judgment interest at six per cent. only is recoverable.

In this case the holder of such a note held a mortgage as collateral security containing a covenant equivalent in its terms to the promise in the note: *Held*, that the right to recover interest at the larger rate named in the covenant was not merged in a judgment recovered on the note.

This was an appeal by the defendant from a decision upon certain questions by Proudfoot, V. C., in reviewing the report of the Master at St. Catharines, reported 26 Gr. 249. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 14th May, 1879 (*a*).

Bethune, Q. C., (*P. McCarthy* with him,) for the appellant. The Master and the Vice-Chancellor should have found upon the evidence that only $500 was advanced upon the mortgage in January, 1862, and should have charged the appellant with that sum only as having been then advanced, instead of $3,000. The Vice-Chancellor erred in allowing interest at the rate of 24 per cent. per annum, as the respondent should have received only six per cent. after default, and the Master's finding on that point should be restored, and the decree reversed. In any event, the rate of interest allowed after the recovery of judgment should be only six per cent., even if a larger rate of interest be allowed up to the time of such

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recovery. The evidence shewed that the $510 note was paid. The claim in respect of the $500 was barred by the Statute of Limitations, and for that reason that part of the decree which allowed the respondent to apply part of the payment of $2,000 to this sum should be reversed, as the appellant had, at the time of payment, made a different application of it; at all events the respondent made a different application, and under the circumstances ought now to be allowed to change the same. They cited *Hemp* v. *Garland*, 5 Q. B. 524; *In re European Central R. W. Co.*, L. R. 4 Ch. D. 33; *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Dalby* v. *Humphrey*, 37 U. C. R. 514; *Young* v. *Flike*, 15 C. P. 360.

Blake, Q. C., (with him *J. S. Ewart*,) for the respondent. The Master found upon the evidence that $3,000 was advanced in January, 1862, and not $500, as contended for by the appellant. The question was fully considered by the Master, and his finding should not be disturbed. The appellant himself by his answer shews that more than $500 was advanced, inasmuch as he alleges that he paid on account of it $1,150 and $2,000. All the documentary evidence, including a memorandum over the appellant's own signature, is against his contention; and the oaths of the respondent and Mr. Currie are opposed to that of the appellant. There is no reason for reducing the rate of interest contracted to be paid merely because the creditor has recovered a judgment upon one of the securities held as collateral for the payment of the debt. The note was paid, and the Vice-Chancellor so held in holding that the respondent had applied a sum of $2,000 to its liquidation. Irrespective of this, however, the Master, after a most careful examination of the evidence before him, determined that the $510 note was not paid, and his finding ought not to be disturbed. The respondent has always had possession of the note. The only evidence of payment is, the appellant's unsupported statement, which is in itself of the most general character. He swore that it was paid within a

week or a month after it was given, whereas his own letter of 19th December, 1861, contradicts the statement. He does not profess to be able to say how it was paid, whether in cash or how otherwise. See *Morrison* v. *Robinson*, 19 Gr. 480. The $510 note cannot be barred by the Statute of Limitations. It is dated the 18th November, 1861. On the 6th of March, 1867, the appellant, being indebted to the respondent in various amounts, paid to him $2,000 upon his whole indebtedness, and by agreement in writing the time for payment of the balance was extended and spread over a series of years. No specific appropriation was made of the $2,000 by either party at the time of payment. In 1872 the respondent delivered certain accounts to the appellant by which the $2,000 was appropriated to the payment of the $510 note and some other debts. The note is, therefore, now paid.

May 20, 1879 (*a*). Moss, C. J. A., delivered the judgment of the Court.

The plaintiff filed his bill as an execution creditor, under a judgment recovered against the defendant Rykert and Mrs. Anna Maria Rykert. The defendants were J. C. Rykert and Mr. Burns, and the foundation of the suit was, that the defendant Rykert, with the design of preventing the plaintiff from recovering, procured certain land in St. Catharines to be conveyed to his co-defendant as a secret trustee. The relief sought was, that appropriate to a suit by a creditor who impeaches a conveyance as fraudulent under the statute of Elizabeth. By his answer Rykert denied the existence of any trust for his benefit, and alleged that Burns had purchased the property with his own money for the benefit of his, Rykert's, wife. He also advanced certain statements with reference to the dealings between the plaintiff and himself, to which I shall have occasion to refer when weighing the testimony. The defendant Burns set up that he was applied to by Rykert

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for a loan of a certain sum of money upon the security of the property, the title to which was vested in John Page, and that Rykert proposed to him to take a deed from Page and hold the land as a security for his advance, and that the transaction was carried out upon this footing. He disclaimed all interest in the land except as security for his own advance. A decree was made—it is stated at the bar by consent, although this does not appear upon its face—declaring that the lands are held by Burns as a trustee for Rykert, subject only to the amount of the advance, and that they are liable for the payment of the amount due by Rykert to the plaintiff, and referring it to the Master to take an account of all the dealings between the plaintiff and Rykert, and ordering payment to the plaintiff and to Burns, and in default a sale according to the usual practice of the Court. From the answer of Rykert it appeared that there were various dealings and transactions between the parties, including a mortgage to the plaintiff of certain lands in Grantham, and the delivery to him of a promissory note endorsed by Sheldon Hawley. The defendant by way of cross-relief, asked that the accounts between himself and the plaintiff should be taken by the Court, and submitted to pay what should be found due, and asked for a discharge of the mortgage. The decree, it is to be observed, while directing the accounts to be taken, and the balance to be paid, has omitted, I have no doubt from inadvertence, to provide for redelivery of securities and a final settlement between the contending parties. It is agreed, however, that this defect may now be remedied, if necessary.

The evidence in the case is voluminous, and the transactions so intricate and so irregularly recorded, as to render the task of unravelling them one of unusual difficulty. Many points were raised before the Master, who bestowed the greatest care and attention upon all the details, and prepared an elaborate statement of the reasons for his findings, which has been of marked value and assistance to the Court.

The controversy is now confined within much narrower limits, there being only three questions upon which the appellant now asks the judgment of the Court.

His first contention is, that the Master and the Vice-Chancellor should have held that only $500 had been advanced by the plaintiff upon the mortgage for $3,000, to which I have already referred.

The second is, that a promissory note for $510 should have been held to have been either paid or barred by the Statute of Limitations.

And the third is, that the Vice-Chancellor's order is erroneous in allowing the plaintiff interest at the rate of twenty-four per cent. per annum since the recovery of the judgment.

The evidence relating to the first question is far from satisfactory. It is abundantly clear that neither the plaintiff nor the defendant had a precise or accurate recollection of the attendant circumstances. The defendant made no record of his transactions, and the books of the plaintiff are so irregular and unsystematic, that they lend very small assistance towards arriving at the truth. It is certain that on the 15th of January, 1862, for so remote is the transaction, the defendant applied to the plaintiff for a loan or advance. By what negociations this had been preceded it is now impossible to tell, but the defendant must have confidently anticipated a favourable result to his application, for he had already registered the mortgage, which is dated the 11th of January, 1862. He also brought with him a promissory note of the same date for $3,000, which had been endorsed for his accommodation by Sheldon Hawley. The proviso in the mortgage is for payment of $3,000 on the 11th of July, 1862, with interest at the rate of twenty-four per cent. per annum *until paid*, and states that this sum is secured by the Hawley note. The plaintiff at this date held various bills and notes, which he had discounted for the defendant, and which seem to have amounted to about $2,250. The defendant's version of what occurred is, that he desired to obtain a loan of $3,000

upon the security of the mortgage and the Hawley note, but that plaintiff refused to advance more than $500, and insisted upon holding the mortgage and note as security for the existing obligations, and that his needs were so urgent that he was obliged to yield to this demand. The plaintiff's original statement pointed to a payment to Rykert of $3,000, in a single distinct sum. He said, "I had a bank-book and cheque-books. I think I kept my account at the Bank of Upper Canada. I at one time paid defendant $3,000 in gold. At the time Mr. Currie was present. I can't say where I got the gold. I was at that time dealing in silver and gold. I had moneys lying by me in large amounts for special purposes. I do not remember having the gold referred to for any special purpose. I can't say how long I had the gold in hand. I would very often keep amounts out of bank. I can't say at what time of day I paid the amount. I paid this amount in my store, where McGee keeps store. I looked for my cash book, but have not found it. My custom is, to make entries of moneys paid out and received." Observations were addressed to us with respect to the improbability of plaintiff having had or paid such a large sum in gold, when he had a bank account, but as it is conceded that whatever sum was actually paid to Rykert, which he puts at $500, was in coin, any inference to be drawn from this circumstance would be purely conjectural. I may observe here that Currrie, who was acting as solicitor for the plaintiff on that occasion, when first examined, said that he was present when one large loan was made by the plaintiff to defendant; that it was made in gold, but he could not say how much it was, nor what security was given. Being again called at a later stage of the proceedings, he stated that he should say there was about $3,000, and that he fixed the amount "on account of the bulk" he saw; that he distinctly remembered that the loan was made between 8 and 9 o'clock at night. This witness evidently speaks of a single payment, and of its covering the whole amount which the plaintiff had agreed to advance. When

the plaintiff gave the account, which I have quoted, his attention had not been directed to a memorandum, which was endorsed upon the mortgage, and has since been partially erased by three parallel pencil lines drawn across it. This endorsement is as follows :—

"I acknowledge that I hold the within mortgage simply for the sum of $500 and interest, as that is the whole amount I have advanced thereon, and which amount is also secured by the note of the mortgagor to me. As witness my hand and seal this 15th day of January, A.D., 1862.

"S. L. St. John."

It is in the handwriting of Mr. Currie. Upon being referred to it upon cross-examination, the plaintiff's statements seem to exhibit much uncertainty and confusion. He said he did not know what became of the note for $500 therein referred to: that his *impression* is, that it was taken up by the defendant when he got the $3,000: that his *impression* is that he held the mortgage for $500, that Rykert afterwards (to use his own words) "took this up and got $3,000 on it": that when he first got the $3,000 mortgage it was only to be as a security for $500, and only $500 was at first advanced, but after talking the matter over he agreed to let Rykert have the balance of the $3,000 on receiving the note of one Durham and certain other securities: that Currie was present when this was agreed upon: that Rykert got the *balance*, before leaving his office, in gold: that all he was to advance to Rykert when he brought the mortgage was $500: that his impression is, that he was only to get a mortgage for an advance of $500: and that he didn't know when Rykert came into his office that he had a mortgage drawn up for $3,000.

It is difficult to reconcile this statement with Currie's, and notably in the important particular that the latter distinctly swears that the loan had been talked over before the day on which the money was paid, and that Rykert had proposed to borrow, and the plaintiff had agreed to lend whatever the sum was that was agreed upon.

It seems reasonably certain that Currie only saw one

payment made, and if the proper inference from the plaintiff's final account of the affair is, that there were two separate payments, the plaintiff is the sole witness to that of the $2,500, and is flatly contradicted by the defendant. There is an entry in St. John's book which relates to the transaction, but it is partly in pencil, and no one could form a satisfactory opinion as to the date at which it was made. There could be no stronger illustration of the uselessness of these books as evidence, than is furnished by an inspection of these very entries. If the case had rested upon this foundation, it would seem that the plaintiff must fail upon the simple view that he had not relieved himself of the onus which was cast upon him by his conflicting statements, and especially by the apparent admission that there had been a first payment of $500. But there are other circumstances which go far to support his assertion that the whole sum was actually advanced. To these I shall briefly advert. In the first place, although the defendant refers in his answer to this mortgage, and to the promissory note of Hawley, there is no trace of a suggestion that the full consideration was not received. He alleges that judgment was recovered by the plaintiff upon the note and execution issued; that the judgment on which this writ is founded was held by the plaintiff as collateral security for the mortgage and Hawley note; that after the recovery of both these judgments he paid the plaintiff $1,300, and the sheriff realized $1,150 under the execution against Hawley; and that about the 6th of March, 1867, he paid the plaintiff the sum of $2,000, which was more than the balance remaining due upon the judgment sued on and the mortgage. It is true that the question with which the defendant was then dealing, and the claim which he was then opposing, did not directly arise upon the mortgage, but upon the judgment recovered against himself and Mrs. Anna Maria Rykert. Still, it is difficult to explain the terms in which he speaks of the whole transaction, if we suppose that it was then present to his mind that the real amount advanced was only $500. Again, the defendant did not advance this con-

tention, so far as we can perceive, until he saw the endorsement upon the mortgage. This may have only served to refresh his memory; but, however little we may be disposed to doubt the sincerity of the present contention, or even the accuracy of the defendant's recollection, after effaced impressions have been restored by the writing, it is extremely obvious that upon general principles of wide-reaching application, a claim thus advanced must be received with the greatest caution. The next piece of evidence upon which the plaintiff relies is certainly of great cogency. It is in the form of a memorandum written and signed by the defendant, and seems to have been first produced upon his cross-examination, after he had stated that he had only received $1,500. It bears date of the 15th of January, 1862, and is in these terms: "The mortgage executed by me in favour of S. L. St. John for $3,000 is to remain in his hands as security for the full amount therein specified to be payable, and the endorsement thereon is to be of no avail."

The explanation of this offered by the defendant is, that the plaintiff insisted that the mortgage should stand as collateral security for other notes which he had discounted and held, amounting in the whole to more than $3,000, and that he was obliged to submit to the plaintiff's dictation. But it seems improbable that the defendant after receiving $500, and after the endorsement being made upon the mortgage, should have assented to these terms without any fresh consideration. It is also made subject of just comment that on the 4th March, 1862, the note of $3,400 endorsed by Mrs. Anna Maria Rykert, was given as collateral security for these notes. Again, it is shewn that in March, 1867, the defendant paid the plaintiff the sum of $2,000, which, with other credits he was entitled to, would have reduced to a very small sum, if it did not cancel, the whole amount of his liability on the assumption that only $500 had been advanced. Yet on this occasion the defendant stipulated for, and obtained an extension of time to pay the balance in four equal annual instal-

ments. This leads strongly to the inference that there was still a considerable sum remaining due, or at least that this was the defendant's belief with regard to the state of the accounts. Although not in itself a very strong circumstance, it is not without its weight where probabilities must be nicely balanced, that when the defendant sought from the plaintiff a statement of their dealings it was in the shape of a request for a statement of his indebtedness. The language of the memorandum is certainly peculiar, and it is perhaps impossible to draw from it any satisfactory conclusion. It does not appear to me to be necessarily inconsistent with defendant's view. It does not state, but seems rather to avoid the statement, that the whole amount of the expressed consideration had been advanced. It may mean, when coupled with the endorsement, that although no more than $500 was actually advanced, the mortgage was to stand as a collateral security for defendant's general indebtedness up to the amount of $3,000. But although it may be susceptible of that interpretation, it is certainly a very circuitous mode of expressing a very simple fact. Upon the whole we are of opinion that while there is much to support the defendant's contention, no sufficient ground is shewn for differing from the opinion of the Master and the Vice-Chancellor.

We now proceed to consider the position of the parties with regard to the note of $500 made by the defendant on the 18th November, 1861. The Master declined to hold that the defence of payment had been established, but he ruled that the plaintiff's right to recover was barred by the Statute of Limitations. The learned Vice-Chancellor refused to interfere with the finding upon the question of payment, but he held that the debt was not barred. We have carefully examined the evidence, both oral and documentary, and we must say that in our judgment it preponderates so largely in favour of the defendant's contention that we can feel no hesitation in reversing the finding. We have not the least doubt that if the question were

submitted to a jury, they would unhesitatingly find the issue in favour of the defendant. We are not embarrassed in coming to this conclusion by the supposition that the Master, who had the opportunity of seeing the parties and hearing their testimony delivered, may have preferred one to the other, for in his judgment he distinctly assigns to them an equal desire to tell the truth. Upon their statements read in this light, and upon the inferences which in our opinion the circumstances plainly raise, our judgment is founded.

The very terms of the note itself indicate that it was intended to be a short transaction. The defendant thereby promised to pay the plaintiff the sum of $510 on demand, and interest was to be paid at the rate of $10 per week from 23rd November, 1861. As this rate somewhat exceeded 100 per cent. per annum it appears incredible that the defendant should, as the plaintiff now asserts, have remained for years liable to so exorbitant and even monstrous exaction, when he was able to borrow large sums even from this plaintiff at the comparatively liberal rate of two per cent. a month. It appears from the plaintiff's statement that at the time he made the loan upon this note, Rykert handed him as security a package containing mortgages. These, he says, he handed back within a few days, because he ascertained that they were of no value.

One cannot help thinking that however lightly he may have esteemed them, he was a very unlikely person to have relinquished even a slender chance of their proving to be worth something. No interest was ever paid upon this note, according to the plaintiff's own admission.

In July, 1862, the plaintiff instructed his solicitor to sue Rykert upon the various notes he held, but this was not included in any of the suits. His explanation of this omission will not bear scrutiny. In view of that kind of legal knowledge which persons engaged in this business are certain to acquire, and the possession of which the plaintiff does not disclaim, it seems absurd. He says that it was talked over between his solicitor and himself that—

I quote his exact language: "Rykert being *nulla bona* we might lose our costs, and we thought we would try one of the notes that Rykert was solely maker of." He says that he does not know whether at that time he knew that he could include this note in a suit with other notes without increasing the costs, but if his legal education had not then extended so far, his solicitor would certainly have supplied the deficiency. There remains the fact, full of significance, that an action was brought against Rykert alone upon another note. Indeed, this note of $510 was the only one which was not placed in suit. His other conjectural reason, namely, that he did not wish to reduce the rate of interest by merging the claim in a judgment, may be dismissed without observation. Again, there is an entry, in the plaintiff's mortgage book, which originally was in the following form: "John Charles Rykert to me upon lots, &c., forty-six in all, collateral for $3,000 and interest, and $510.00 two notes." As the entry now stands, the "$510.00" and the "two" have been erased and "one" written in pencil over "two." Thus varied, the entry tends to support the defendant's contention, but I am not disposed to lay very much stress upon the plaintiff's books, even when their results are unfavourable to himself. Then there is a statement, (exhibit D in printed case), which there seems every reason to suppose was intended to comprise all the notes held by the plaintiff, but in which this does not appear. There is another statement made by the plaintiff, (exhibit O,) on March 4, 1862, in which we would naturally expect to find this note mentioned if it were still unsatisfied. The defendant's first assertion is, that he paid the note within a week, and he afterwards varied this by fixing the time at a month. To prove his incorrectness the plaintiff relies upon a writing signed by Rykert of the date of 19th December, 1861, in which he certifies that he had on that day deposited with plaintiff a mortgage to one Hainer, of which he was assignee, and a deed from Elijah Parnal to him of land in Sunnidale, by way of equitable mortgage, for the sum of

$510 advanced upon the note for that amount of the 18th November, 1861. This shows that the note was not paid as soon as the defendant stated, but in another aspect it is important evidence in his favour, for it proved that the Sunnidale property was afterward sold by the defendant, at a large price, and it is certain that the plaintiff no longer held the deed, or claimed any equitable lien.

The claim that this note was unpaid does not appear to have been brought forward until Rykert pressed for a settlement. The Master, upon a careful review of the circumstances, held that he would have decided this issue in favour of the defendant, if he could have pointed to any source whence he could have derived the money to make the payment. We are of opinion that a judgment against him could not safely be based upon such a ground. It was clear that he was able to command money from time to time, although no doubt he was very much pressed and harrassed; but it is little short of incredible, that while these transactions with the plaintiff himself were in progress, and while sums of money were passing through the defendant's hands, he should have allowed a claim to stand with so crushing a rate of interest. This antecedent improbability, together with the plaintiff's inaction, while eagerly pressing every other claim; his surrender of the collateral securities; the character of the entries in his books; the series of years during which this was allowed to sleep; and the other circumstances to which I have adverted, has led our minds to an undoubting conclusion that the note should be held to have been paid. In this we only differ from the tribunal of the first instance in being unable to attach the same weight to the defendant's inability to name the precise source from which the note was paid. This conclusion renders it unnecessary to spend the time of the Court in a discussion of the effect of the Statute of Limitations. We are by no means satisfied that the bar is not effectual, but we prefer not to express a decided opinion either way.

There remains the question of the rate of interest allow-

able after the recovery of judgment. The Master allowed 6 per cent. only, but the learned Judge held the plaintiff to be entitled to 24 per cent., because that rate was reserved by the note upon which the action was brought. The promise was to pay the principal, with interest at the rate of two per cent. per month *till paid.* If the question now concerned the rate for which the plaintiff was entitled to recover in an action upon the note, it is quite certain that the higher rate should be allowed. The case of *Young* v. *Fluke*, 15 C. P. 360, which, in our opinion, was well decided, is expressly in point. The case of *Dalby* v. *Humphrey*, 37 U. C. R. 514, contains nothing at variance with this view, for the note was made payable at 150 days, with interest at 2 per cent. a month, and did not contain the words "until paid." It was accordingly held, that while it was no doubt a part of the contract that interest should be paid for 150 days at that rate, the plaintiff after that was only entitled to damages for the detention of his money, and it did not follow that a jury or Court must give that rate as damages after the the time for payment had elapsed. The Court in fact applied the doctrine established by the House of Lords, in *Cook* v. *Fowler*, L. R. 7 H. L. 27, that there is no rule of law that upon a contract for the payment of money on a day certain with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied. But when judgment was recovered, the position was entirely changed. The note then became merged in the judgment. In respect of the note they could only recover by process of execution the amount of the judgment and interest at six per cent. This is clearly shewn in the judgment of the Court of Appeal in the *Central Railway Case*, L. R. 4 Ch. D. 33.

If, therefore, the plaintiff's case must rest upon his claim under the judgment, which is the form in which it is presented, we think the appeal on this ground should be allowed. Indeed the learned counsel for the plaintiff, as we understood their argument, scarcely contested this

position. But it was urged that the plaintiff also holds a mortgage for this sum which contains a covenant for payment equivalent in its terms to the promise in the note. Although, strictly speaking, this claim does not seem to be open under the present decree, which does not provide for a discharge of the mortgage upon payment, and although the plaintiff does not seem to have introduced it into his account, the counsel for both parties joined in an expression of desire that we should endeavour to make a final settlement of the whole controversy. We are willing to accede to this request, and we hold that the right to recover upon the covenant in the mortgage is not merged in the judgment. This forms a separate and individual cause of action to which the recovery of the previous judgment would not be a legal defence. The Court would of course take care that double executions should not be issued for the same demand, but that is the full extent of relief it would accord. This conclusion, however, compels us to consider another point which the appellant raised before us, although it was not taken until the argument. The Master found that in March, 1862, the plaintiff advanced to Rykert the sum of $500 and received by way of collateral security a mortgage made by one Servos, securing the sum of $1,390, with interest. The amount of this mortgage was realized by the plaintiff, and the result was, that on the 20th of May, 1862, he had received $912.70 in excess of the amount of the note. Upon this sum the mortgagor has charged him with interest at the rate of six per cent. only. This was immaterial to the defendant, while the charge for interest against him was limited to six per cent., and it is suggested that this is the reason why he did not claim a larger allowance in the Master's office. But if he is now to be charged with interest on the $3,000 at 24 per cent., it seems to follow that he should be allowed interest at the same rate upon the balance of the amount realized from the Servos mortgage. It should, in fact, be treated as a payment received by him at that date, and applicable upon the mortgage for $3,000.

The whole result is, that we disallow the appeal as to the amount advanced; we allow it as to the payment of $510 note; and we allow the interest on the $3,000 to continue at 24 per cent., but the plaintiff must be charged with interest at the same rate upon $912.70 from the 20th May, 1862.

Under the circumstances we think justice will be done by awarding costs of the appeal to neither party.

IMPERIAL BANK OF CANADA V. BEATTY.

Pleading—Promissory note—Double stamping—Replication of—Cancellation of stamps—37 Vic., ch. 47, sec. 2.

Held, reversing the judgment of the County Court, that a replication of double stamping under 37 Vic. ch. 17, sec. 12, D., need not be pleaded; the innocence of the holder and the double stamping of the note as soon as he acquired knowledge of the defect in the stamping being matters to be shewn to the satisfaction of the Court or Judge, and, therefore, not requiring to be submitted to the jury nor (necessarily) to appear on the record as a pleading.

Held, also, that although not necessary, such a replication would be proper, the plea of no stamps constituting a conditional defence only.

The plaintiffs' cashier affixed double stamps to a note, the property of the bank, and cancelled them by writing thereon his own initials and the date of the cancellation.

Held, following *Third National Bank* v. *Cosby*, 43 U. C. R. 58, that the cancellation was sufficient.

Baxter v. *Baynes*, 15 C. P. 27, considered.

THIS was an appeal from a judgment of the County Court Judge of York discharging a rule *nisi* to set aside a verdict for the defendant.

The pleadings and facts are stated in the judgment below.

This case was argued on the 13th May, 1879 (*a*).

G. F. Shepley, for the appellants.

R. Martin, Q.C., for the respondent. The arguments and cases cited appear in the judgment.

May 20, 1879 (*a*). PATTERSON, J.A., delivered the judgment of the Court.

The plaintiffs declare upon a promissory note made by the defendant, payable to the order of G. W. Dunn & Co., and endorsed to the plaintiffs.

The pleas are, 1st, *non fecit*. 2nd. That the proper duty was not paid upon the note, by affixing thereto at the time of making thereof stamps of the proper value. 3rd. That at the time of making the note the stamps thereto affixed were not duly cancelled.

The facts shown by the evidence and found by the learned Judge are, that the defendant, who lives in Hamilton, made the note in Hamilton, and sent it unstamped, to G. W. Dunn & Co., in Toronto, on the day of the date of the note, viz., 20th June, 1878: that G. W. Dunn & Co. endorsed the note to the plaintiffs, who discounted it on 4th July, 1878, single stamps being affixed to it upon that day by the book-keeper of Dunn & Co., and cancelled by writing upon them the date, 20th June, 1878: that the note was thus received by the plaintiffs apparently properly stamped, and was retained by the plaintiffs without any knowledge of any defect or irregularity until after this suit was begun, and after pleas pleaded and issue joined, when the facts connected with the stamping were first made known in the course of an examination of the defendant; whereupon the plaintiffs' cashier at once affixed double stamps, cancelling them by writing upon them the date and his initials. There is no doubt that this double stamping was sufficient. The only question possible was the sufficiency of the initialing by the cashier to satisfy the statutory requirements that the initials of the holder shall be written upon the stamp. On this point we follow

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

without hesitation the decision of the Court of Queen's Bench, in *Third National Bank* v. *Cosby*, 43 U. C. R. 58, 72. The validity of the first stamping was attacked on two grounds: first, because Dunn & Co. were not agents of the defendant for the purpose of affixing stamps; which objection was considered in the Court below to be well founded, but which would probably have proved by no means formidable upon a closer investigation. On the principles discussed in *Escott* v. *Escott*, 22 C. P. 305, there would seem but little difficulty in supporting a decision either that Dunn & Co. were authorized on the part of the defendant to affix the stamps as soon as the note reached their hands, or that as payees they might well have done it then on their own behalf. It is not necessary for us to express any decided opinion upon this question, or to discuss the position of the payee concerning which the Queen's Bench, in *Woolley* v. *Hunton*, 33 U. C. R 152, and *Joseph Hall Co.* v. *Harnden*, 34 U. C. R. 8, took a somewhat different view from that held by the Common Pleas, in *Escott* v. *Escott*, and adhered to in *House* v. *House*, 24 C. P, 525, because these payees did not properly stamp the note. What they did was, to single stamp it on the 4th of July, and cancel the stamp only with the date 20th June. The Statute required the date to be that upon which the stamps were affixed, and made that mode of cancellation sufficient only when that date was the date of the note. The requirements of the statute in this particular are fully stated in the judgments delivered in this Court in *La Banque Nationale* v. *Sparks*, 2 App. R. 112.

The plaintiffs have thus to rely upon the double stamping effected by themselves; and their power to avail themselves of this clear statutory cure of all the defects which had existed is involved in technical difficulties which are somewhat surprising.

Issue was joined upon the defendant's pleas, and their sufficiency as an answer to the declaration was not questioned. This is not a matter of surprise when we remember that the plaintiffs had, up to the date of the last pleading,

no reason to suspect any defect or irregularity. But when the necessity for double stamps was discovered and the defects removed, it was naturally felt that the fact of the statutory cure ought to be replied. Leave was therefore asked at the trial to add the replication, and it was granted. But as the Judge in granting it gave the defendant leave to rejoin and demur, the plaintiffs, being anxious to avoid the delay of a demurrer, declined to make the amendment, and went upon the issues as they stood. A verdict was rendered for the defendant, with leave to the plaintiffs to move to enter a verdict for them if the Court should be of opinion that the plaintiffs were entitled on the evidence; the Court having the power to enter a nonsuit.

A rule *nisi* was accordingly obtained to enter a verdict for the plaintiffs, or for a new trial.

After argument, the learned Judge of the County Court remained of the opinion that, upon the record as it stood, the plaintiffs could not succeed; but, in order to give the plaintiffs another opportunity of adding the replication, he was willing to give them a rule absolute for a new trial, on payment of costs. This they declined, and the rule was therefore discharged.

The grounds of appeal from this decision may be shortly stated as follows:—

1. That, under the circumstances disclosed, the rule should have been absolute to enter a verdict for the plaintiffs.

2. That the Statute 37 Vic., ch. 47, sec. 2, D., entitled the plaintiffs to recover without an amendment by replication setting up double stamping.

3. That the amendment, if necessary, should have been made without postponing the trial, or the expense of a new trial: and a fourth ground, which will be best given in the appellant's own words:—

4. "The sole difficulty at the trial having arisen on account of the learned Judge ruling that a replication, setting up the double stamping of the note, was necessary and should be pleaded, as it was said, *puis darrein continuance*,

and that all the plaintiffs' prior pleadings should be struck out, leaving the plaintiffs without a statement of any cause of action upon the record, and it plainly appearing that the plaintiffs were and are entitled to recover, all necessary amendments (if any) should be allowed, and the verdict entered for them; and should any further evidence as to the double stamping of the note be considered necessary, the same should be received by this Court."

The principal contention before us has been that on which these grounds of appeal chiefly insist, viz., that no replication was necessary.

At the trial there seem to have been some mystification, to which the fourth ground of appeal alludes, arising from a fancied analogy between the replication which was proposed and a plea *puis darrein continuance.* It is not easy to account for this, but it appears to have been connected with the idea or apprehension that as a plea *puis darrein continuance* involved a *relicta verificatione,* this replication would somehow confess that the plaintiffs had no cause of action till long after the action had begun, and that so the plaintiffs' own pleadings would put them out of Court. This confusion of ideas, which may have had some influence on the plaintiffs' decision to proceed without making the amendment, doubtless originated in the consideration that the replication would set up facts which occurred after the last pleading, and would admit the truth of the allegations in the plea. We may therefore usefully direct our inquiry to the two points, the propriety of the replication and the necessity for it.

The statutory enactments to be referred to are found in 33 Vic., ch. 13, D., and 37 Vic., ch. 47, D., which substitute sections numbered respectively 11 and 12 for the sections so numbered in the Act 31 Vic., ch. 9.

In section 11 we read, "If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to, or pays any promissory note, draft, or bill of exchange, chargeable with duty under this Act. before the duty (or double duty, as the case may be,) has been paid by affixing thereto the

proper stamp, or stamps, such person shall thereby incur a penalty of one hundred dollars; *and, save only in the case of payment of double duty, as in the next section provided, such instrument shall be invalid, and of no effect in law or equity*, and the acceptance, or payment, or protest thereof, shall be of no effect."

It thus appears that a note is void in case the required duty has not been paid, and in case double duty has not been paid. If the proper duty is originally paid, or if double duty is paid, as permitted by section 12, the note is valid. A plea which merely alleges that a note was not originally duly stamped, will not therefore show that the note is void under the statute, unless in a case such as *Escott* v. *Escott*, 22 C. P. 305, where it appears that there was no person who could lawfully have cured the original want of stamps by double stamping it. (See 1 *Wms. Saund.*, 6th ed., 262, note, 1. a note which is omitted from the later edition; and see *Rex* v. *Pratten*, 6 T. R. 579; *Thibault* v. *Gibson*, 12 M. & W. 88; *Van Boven's Case*, 9 Q. B. 669; *Simpson* v. *Ready*, 12 M. & W. 736; *Edmunds q. t.* v. *Hooey*, 35 U. C. R. 495.)

This rule of pleading has been generally observed in cases under our Stamp Act, as in *Younge* v *Waggoner*, 29 U. C. R. 35; *Kerby* v. *Hall*, 21 C. P. 377; *Woolley* v. *Hunton*, 33 U. C. R. 152; *McCalla* v. *Robinson*, 19 C. P. 113; *Henderson* v. *Gesner*, 25 U. C. R. 184; *House* v. *House*, 24 C. P. 526; though in other cases such as *Joseph Hall Co.* v. *Harnden*, 34 U. C. R. 8, some careless pleader may not have negatived the double stamping, and the plaintiff may have been content to reply to it. The unskilful character of the pleadings in the case just named is pointed out by Wilson, J., in giving judgment in the case.

In the case before us, the plea does not negative the payment of double duty before action. Had it done so, it would have been true in fact, and would have been a good plea under section 11.

Section 12, however, provides that, " any holder of such instrument may pay double duty by affixing, &c.. and where

in any suit or proceeding in law or equity, the validity of such instrument is questioned by reason of the proper duty thereon not having been paid. * * * and it appears that the holder thereof when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even though such knowledge shall have been acquired only during such suit or proceeding; and then the section proceeds with what is probably already covered by the former part, declaring that "if it shall appear in any such suit, or proceeding, to the satisfaction of the Court or Judge, as the case may be, that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument, or any endorsement or transfer thereof, shall be held legal and valid, if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake; but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid."

Two things may be here noted: 1st. that upon double duty being paid by a person entitled to pay it the instrument is to be held legal and valid, which evidently means legal and valid as of its original date. It is not to *become* legal and valid, but the cure is to relate back. If an action is pending, the note is cured for the purpose of establishing a cause of actiou existing when the action was commenced which could only be by removing the taint of illegality as if it had never existed; and, therefore, 2ndly, a promissory note cannot, in the absence of an adjudication to that effect, be pronounced absolutely void until final judgment is entered in an action upon it; as up to that moment it may be validated by the payment of double duty by a holder entitled by the necessary *bona fides* to pay it. Up to judgment its invalidity is, as it were, inchoate, presumptive, or conditional.

When, therefore, a plea alleges that up to the moment of pleading neither single nor double duty has been paid, it merely shows that the note will be void provided no one entitled to cure the defect shall interpose to cure it. It shows that all the conditions of avoidance which up to that moment are possible have happened; that an illegality exists which may ripen into an avoidance which shall be absolute, but which in the meantime is contingent upon the absence of the interposition of lawful double stamping. If such interposition takes place, the imputation of illegality ceases, and the note is held legal and valid. A replication which shows that the double duty has been duly paid, though after the last pleading, does not assert that now for the first time a cause of action was vested in plaintiff; it shows that the note declared on is, as set out in the declaration, legal and valid. Such a replication is therefore proper. Mr. Shepley suggested that it was like an estoppel; and although the principle of estoppel is of course absent, the effect is not dissimilar. The distinction is, that a replication by way of estoppel sets out reasons why the facts stated in the plea and admitted by the replication should not be advanced. The replication we are considering merely places on the record facts which, read along with those alleged in the plea, show that the condition necessary to make the plea an absolute defence has failed, and that the declaration remains unanswered.

So much as to the propriety of the replication. We have now to consider the necessity for it.

It was decided in *Baxter* v. *Baynes*, 15 C. P. 237, in the early days of our Stamp Acts, that the defence of nonpayment of duty must be raised by plea; and although the very material change in the law which permits defective stamping to be cured after action brought has depived the plea of the conclusive character which attached to it under the earlier statutes, the continued necessity for a plea has not, so far as I am aware, been questioned in any action.

The plea should set out facts which, if uncontradicted, would show that, up to the time of pleading, the law had

not been complied with. No replication of matters which occurred before plea pleaded should be required. If the validity of the note came to depend, as in this case, upon matters subsequent, a replication of such matters would not be open to objection; but the language and scope of section 12 afford grounds for questioning its necessity.

The last half of the section, which I have separated in quoting it above, is not an enactment independent of that contained in the earlier portion. It is essentially a repetition of the former part. In the section as it stood in 33 Vic. ch. 13, D., the last half referred to cases in which part of the duty had been paid, and part left unpaid; and so it fulfilled a purpose different from that to which the first half was devoted. We have now to look at it in the amended form given in 37 Vic. ch. 47; and finding the general enactment of the clause twice expressed, though in slightly different language, we must read both parts together, and gather the effect from a view of the whole clause. We thus perceive that the facts which entitle the holder to double stamp the note are to appear to the satisfaction of *the Court or Judge*, as the case may be. It does not seem to be the intention to submit these facts to a jury. If the facts so appear, then the note is to be held legal and valid, and this at any stage of the suit or proceeding, whether before, or at, or after the trial of any issues on the record. An application based on this effect of the clause was made to this Court, in *LaBanque Nationale* v. *Sparks*, 2 App. R. 128; and the Court, while refusing the application on the merits, affirmed the construction placed upon the statute. We have thus two substantial reasons against the necessity, if not also against the propriety, of including among the issues on the record as to which a *venire juratores* may be awarded, an issue concerning the payment of double duty after plea pleaded. No doubt the idea of disposing of any question upon which the maintenance of the action may depend, without formal issues upon the record, strikes one as anomalous, and may not be readily reconcilable with our conceptions of pleadings as a science; but we must

remember that it is only one of several anomalies. We are not familiar with the notion of pleading a plea which may be true, and yet may be displaced by matters subsequent, and which, therefore, must be regarded as a conditional defence only.

It may be that the decision in *Baxter* v. *Baynes*, 15 C. P. 27, which established a sound and safe rule under the law which permitted no change, after action brought, in the legal character of the instrument in suit, would bear reconsideration as applied to the present state of the law; or it may be that the anomalies could be best avoided by the adoption of the simple system which in England forbids the unstampted document to be received in evidence. As it is, however, the plea itself is anomalous in its character, and does not seem susceptible of being dealt with on the strict rules of common law pleading. It is well also to keep in view that it is not one which raises any question of merits between the parties, and that possibly it should be regarded more as a suggestion than as a formal plea. If the effect of it is, as I have tried to point out, to place upon the record facts which do not necessarily, even if confessed, entitle the defendant to succeed, it would seem to follow that even if called a plea, the circumstance that judgment was given on the whole record for the plaintiff without any answer to those facts appearing on the record, would not sustain an assignment of error. When the Court at an advanced stage of the suit, as for example, under the circumstances in which the application was made in *La Banque Nationale* v. *Sparks*, permits the payment of double duty, it would be only some stringent technical necessity, without real substance or meaning, which could attach the slightest importance to going through the form of filing a replication; and there can be no intelligible distinction made between the act done at that latest stage of the case, or at any earlier stage after plea. It may be proper or advisable that some record of the action taken should appear, whether by way of suggestion or otherwise, but that is a detail of practice which the Courts can easily settle.

The question is not embarrassed by any consideration of prejudice to the defendant or interference with his rights. The stamp law does not aim at his protection. It looks merely to the interest of the revenue. In most cases the defence under the statute is an assertion by the defendant that he has himself violated the law. The advantage he gets in being able, by setting up his own breach of the law, to evade the performance of his contract and to defraud his creditor is an accident of which he may be able to avail himself, but which constitutes no meritorious claim to the consideration of the Court. The Legislature, by enabling the innocent holder to validate the note in even the latest proceedings of a suit upon it, (and it makes no difference in this respect whether it is effected by the aid of a pleading or a suggestion, or merely an oath or an affidavit,) has indicated this appreciation of the position of the party who sets up the statute as a defence.

The result is, that the appeal must be allowed, with costs, and the rule below made absolute to enter a verdict for the plaintiff, on the ground that there was no necessity for the application.

Appeal allowed.

BEATTY V. HALDAN ET AL.

Administrator pendente lite—Suit against—Accounting—Costs.

Pending proceedings in the suit of *Wilson* v. *Wilson*, to set aside the will of T. W. The defendant H, was appointed administrator *pendente lite*. After a decree was made setting aside the will, a prior valid will was proved by the plaintiff in this suit, J. W. & C. B., as executors, the latter having also been an executor under the former will, and one of the plaintiffs in *Wilson* v. *Wilson*. Under an order made just before the conclusion of the suit of *Wilson* v. *Wilson*, H. passed his accounts, and a report was made determining the result of his dealings with the estate. Shortly afterwards the plaintiffs, J. W. & C. B. filed a bill against H. & D. who was the plaintiff's solicitor in the former suit, charging that H. employed D. as his legal adviser in all matters connected with the estate; that D. received large sums of money which he retained for a long time; that the Master on passing H.'s accounts and moderating D.'s bill of costs, refused to allow C. B. to appear on the inquiry; that at the procurement of D., another solicitor was appointed to represent H.; that he did not oppose the allowance of many objectionable items; and that H. had received sums of money for which he had not accounted. The prayer was, that the accounts and bills of costs might be opened up, and that the defendants might be ordered to pay into Court such sums as might have been over-paid or wrongly charged.

The proceedings on which the costs complained of were incurred had not been sanctioned by the Court, and were taken by H. upon his own responsibliity.

Held, reversing the decree of Blake, V. C., that an administrator *pendente lite* is amenable to a suit in equity; and that H. was liable to account to the plaintiff.

Held, also, that the plaintiffs were right, in not having proceeded by petition in the suit of *Wilson* v. *Wilson*, in which J. W. was not a party, and C. B., though a party, did not represent the beneficiaries under the first will.

Held, also, that the bill could not be sustained as against D., for if H. had improperly paid him costs out of the estate, H. was liable, but there was no privity between D. and the plaintiffs.

As the plaintiffs' true equity was only obscurely asserted by the bill, and the reasons of appeal, they were refused the costs up to the hearing and of the appeal.

Semble, that D. should only have recovered the costs of a successful demurrer in the Court below; and the appeal against him was, therefore, dismissed, without costs.

THIS was an appeal from a decree of Blake, V. C., dismissing a bill for an account against an administrator *pendente lite*.

It appeared that Thomas Wilson, having died in 1873, a will was propounded which made certain dispositions of his property, and appointed the plaintiff Charles Beatty and one Catharine Wilson, his executors. A bill to set aside this will, was filed by Mrs. Wilson against Catharine Wilson and

Charles Beatty, but James Wilson, one of the present plaintiffs, was not made a party to the suit. This will having been set aside by a decree of the Vice-Chancellor, dated the 3rd March, 1875, a re-hearing was had, and the full Court, on the 21st of February, 1877, affirmed the decree. On the 29th April, 1875, after the proceedings for re-hearing had been commenced, the Court of Chancery appointed the defendant Haldan, administrator *pendente lite.* After the affirmance of the decree, probate of a prior valid will made in January, 1871, was granted to the present plaintiffs Beatty and Wilson, as executors. The probate was granted on the 16th March, 1877. In October, 1876, before the order upon re-hearing, an order was made in the suit of *Wilson* v. *Wilson*, 22 Gr. 39, 24 Gr. 377, that Haldan should pass his accounts as such administrator. These were brought in, and a report was made on the 5th March, 1877, which determined the result of most of his dealings with the estate. At that date, probate of the valid will had not been granted to the present plaintiffs, and James Wilson had no right to take any part in the investigation before the Master. It was only a few days previously that the invalidity of the will had been determined by the full Court.

This bill was shortly afterwards filed against Haldan and Mr. Donovan, who was the solicitor for the plaintiff in the suit of *Wilson* v. *Wilson*. It contained allegations attacking the conduct of both of these gentlemen. For example, it alleged that Haldan employed Donovan as his general attorney and solicitor, and legal adviser, in all matters connected with the estate, and permitted him to act almost as he pleased in its management; that the Master, on passing Mr. Haldan's accounts, referred to the taxing officer for moderation bills of costs of Mr. Donovan amounting to about $3,000, and refused to allow the plaintiff Charles Beatty to appear upon this enquiry; that at the procurement of Donovan another solicitor was appointed to represent Haldan before the taxing officer, and that he did not oppose the allowance of many objectionable

items or protect the estate, in consequence of which a very large sum was allowed; that this gentleman really acted for Mr. Donovan, and that they conspired to withhold from the Master proper information. It specified various items toward which these charges were directed, and made a general averment that Haldan had used sums of money for which he had not accounted. The prayer was, that the said accounts and bills of costs might be opened and taken afresh, and that the defendant might be ordered to pay into Court such sums as may have been overpaid or wrongly allowed. The defendant Haldan set up that he had passed his accounts in obedience to the Master's warrant, and denied all the plaintiffs' charges of neglect and improper conduct. He admitted the employment of his co-defendant as general solicitor in the management of the estate, and justified it on the ground of the special knowledge of its affairs that gentleman possessed; but he alleged that in all matters wherein the interests of the estate and those of his solicitor might conflict, and in all matters wherein he had to account to the estate, he was invariably represented by an independent solicitor. He also submitted that the bill was unnecessary, and that his proceedings could have been more conveniently and less expensively enquired into the in the suit of *Wilson* v. *Wilson*. By his answer, Mr. Donovan defended the propriety of his charges as solicitor, and repelled the attacks upon his proceedings and conduct. He submitted that the bill was vexatious and contrary to the practice of the Court, and that the plaintiffs could have obtained any relief to which they were entitled by a petition in the suit of *Wilson* v. *Wilson*. Upon this record the parties proceeded to trial, when the plaintiffs' counsel desired to enter into evidence bearing upon the general condition of Wilson's estate, and other matters, which in the opinion of the learned Judge were not open upon the pleadings. He is reported to have thus ruled: "The Master has made his report, the accounts have been settled, and the money paid into Court; and if you desire to attack any item, the subject of these accounts thus

passed by the Master, it will be necessary for you to call the attention of the other side specifically to each of the items you intend to attack, and unless you do that, I will not allow any evidence to be given upon it." The learned counsel asked for leave to amend, but the other side not being prepared to proceed upon an altered record, the examination was continued subject to many objections by the counsel for the defendants. The bill was finally dismissed, with costs.

The case was argued on the 10th March, 1879 (*a*).

Maclennan, Q.C., (with him *Haverson*), for the appellant Upon probate of the first will being granted to the appellants, they became entitled to call upon Haldan for an account, and this bill is virtually one for that purpose. Haldan says, in his reasons against the appeal, that he has brought in his accounts and passed them in the former suit of *Wilson* v. *Wilson*, and cannot be called on a second time. The order however directing him to pass these accounts was made in the absence of the plaintiffs, and they were not present, nor were they called upon to be present when they were passed. The only persons who were present at the taking of the accounts were Haldan and his solicitor, for Donovan was acting for him. The learned Vice-Chancellor misapprehended the nature of this bill, and thought that we were endeavouring to open up a settled account, and that items intended to be attacked should have been given. The defendant having been a general administrator and entitled to all his powers except those of distribution, the plaintiffs are entitled to an account as a matter of course.

Spencer, for the respondent Haldan. The beneficial owners of the estate were represented at the principal passing of the accounts by their solicitors, and, in the absence of fraud, the Master's report is final. Being an administrator *pendente lite* he was an officer of the Court, and the

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

relief sought should have been asked for by way of petition in the original suit or by summary application: R. S. O. ch. 46 sec. 51; ch. 40 sec. 41; *Flood* on Wills, 729-730; *Williams* on Executors, 6th ed. 498; *In re Graves*, 1 Hagg. E., 313.

Donovan, in person, as to necessity for proceeding against Haldan being by way of motion or petition, cited *In re Burke*, 1 B. & B 74; *Brooks's* Surrogate Court Practice 459; *Tichborne* v. *Tichborne*, 1 L. R. P. & D. 730. He contended that even if Haldan had paid improper and excessive charges for costs, the appellants remedy, if any, was against him alone; and that there was no privity between the appellants and him to entitle them to call for a retaxation of the costs.

Maclennan, Q. C., in reply. The case of *Tichborne* v. *Tichborne*, L. R. 1 P. & D. 730, shews that an action may be brought against an administrator *pendente lite*. Donovan was properly made a party to the bill. It alleges that Haldan improperly handed over money belonging to the estate to Donovan, and if Haldan is made to pay any of these moneys over again, he can recover them from Donovan.

May 20, 1879 (*a*). MOSS, C. J. A.—From the pleadings and the report of the discussion at the hearing, we cannot fail to perceive that the argument before us proceeded upon grounds very different from those advanced in the Court below. The right now mainly insisted upon seems scarcely to have been brought to the attention of the learned Judge from whose decree the appeal is brought. It seems to have been treated as a suit to open up a settled account, in which distinct allegations must be made, and proof given of specific errors or fraudulent acts. Before us it has been mainly rested upon the right of executors to demand a general account from one who has dealt with the assets of the estate. The facts which seem to be established, are

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

certainly peculiar. [The Chief Justice here recited the facts as above.]

The printed reasons of appeal are in substance that the learned Vice-Chancellor confined the plaintiffs to evidence as to specific items, whereas from the nature of the case that could not be done without amendment, which was refused; that the allegation of fraud in the bill, and the evidence adduced, entitled the plaintiffs to be allowed to *open the accounts;* that the plaintiffs were willing to submit to any terms that might have been imposed, if they were allowed to open the accounts and be present at the taxation of the costs complained of; and in general terms that the amendment was improperly refused. From all this it is quite apparent that the plaintiffs' own notion was, that they were seeking to open a settled account.

But upon the argument in this Court the plaintiffs' right was placed upon the broad ground that there was no binding settlement of the accounts, because the beneficiaries under the valid will were not represented, inasmuch as James Wilson was no party to the investigation, and it was a mere accident that Charles Beatty had been named an executor in each will. To meet this the defendant Haldan is obliged to rely upon the alleged finality of the Master's report, and in a minor degree upon the objection that the proceeding ought to be upon petition in the original suit.

It is necessary, therefore, to examine the true nature of his position as administrator *pendente lite.* He received his appointment from the Court of Chancery under the authority conferred by 23 Vic. ch. 93, sec. 36, (R. S. O. ch. 46, sec. 51), which enacts that "pending any suit touching the validity of the will of any deceased person, * * the Court, *in which such suit is pending,* may appoint an administrator of the personal estate * * ; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate; and every such administrator shall be sub-

ject to the immediate control of the Court and act under its direction." In England the jurisdiction had, prior to the Probate Act, been vested in the ordinary. The appointee was considered an officer of the Court, whose duty it was to collect and hold the effects until the termination of the suit. In *Re Graves*, 1 Hagg. 313, cited at the bar, it is laid down that an administrator *pendente lite*, is merely an officer of the Court, and holds the property only until the suit terminates; as soon as it is concluded, he must pay over all that he has received in his character of administrator to the persons pronounced by the Court to be entitled. His other functions are then completely at an end, and the Court is bound to take care he discharges the duty committed, as far as the delivery over of everything to the proper party. The appointment of such an officer was not the only remedy the law provided for the protection of an estate pending a litigation for probate or administration. The Court of Chancery had from an early period been in the habit of granting a receiver in a proper case. This jurisdiction was originally assumed under the impression that the Ecclesiastical Court had no authority to appoint an administrator *ad colligendum*, and was not abandoned when it was decided in *Walker* v. *Woollaston*, 2 P. W. 576, that this impression was unfounded. It was the practice of the Court to grant a receiver as of course, when no probate or administration had been awarded, (*Rendall* v. *Rendall*, 1 Ha. 15), but when probate or administration had once been granted the appointment of a receiver was refused, unless the legal title was abused or was in danger of being so, (*Devy* v. *Thornton*, 9 Ha. 229). In this state of the law the Probate Act, 20 and 21 Vic. ch. 77, was passed abolishing the testamentary jurisdiction of the Ecclesiastical Courts, and establishing a Court of Probate. Section 51 of our Surrogate Courts Act of 1859, was copied from the 70th section of that Act, with the addition of the words, "in which such suit is pending." The effect of this clause was to confer upon the new Court jurisdiction to appoint such an administrator. The alteration introduced into our

Statute has the effect of giving the jurisdiction to the Court in which the validity of a will is being questioned. This change may have arisen from the absence of any central Court of Probate in the Province. It is possible that the intention of the Legislature may have been to vest this power in the Surrogate Court, to which the grant of probate or letters of administration properly belonged. It may have been that for the moment it was forgotten that the validity of a will might be contested elsewhere than in a Surrogate Court. But whatever the origin of this departure from the exact language of the English clause, there is no room for doubt as to its interpretation. Clearly it gives the Court of Chancery power to appoint, where it is exercising its statutory jurisdiction of trying the validity of a will.

Since the passage of the Probate Court Act, the character and office of such an administrator have been considered in several reported cases. In *Veret* v. *Duprez*, L. R. 6 Eq. 329, the Vice-Chancellor held that as the Court of Probate could appoint an administrator *pendente lite*, who had full power to deal with the estate except for the purpose of distribution, and as the appointment of a receiver could afford no greater protection, it should be refused. In *Hitchen* v. *Dirks*, L. R. 10 Eq. 471, the Master of the Rolls intimated that the jurisdiction of the Court had not been taken away, but that a stronger case than formerly must be made for the appointment of a receiver, In *Tichborne* v. *Tichborne*, L. R. 1 P. & D. 730, Lord Penzance thought there was no danger of any conflict of jurisdiction. He remarked: "This Court can do nothing to compel payment of the debts, but it can appoint an administrator, and the Court of Chancery holding its hand over that administrator, can make such orders it thinks right for the payment of the debts." After the appointment of the administrator *pendente lite*, a creditor filed a bill against him for the administration of the estate of the deceased, and an order was made directing the several inquiries to be made, and ordering the personal

estate to be applied in payment of debts. This shews that although the administrator was primarily an officer of the Court of Probate, and was to act under its orders, the Court of Chancery possessed the same jurisdiction as if he had been an ordinary administrator. Upon a notice being made in the Court of Probate to stay a sale which had been advertised by the administrator, Lord Penzance refused to interfere.

From the proceedings in this celebrated case, it is plainly deducible that our Court of Chancery would maintain a bill filed against an administrator *pendente lite* appointed by another Court. These considerations seem to dispose of the argument that because such an administrator is declared by the statute to be an officer of the Court, he is not amenable to a suit in equity. In fact every administrator may be said to be an officer of the Court by whom he is appointed. Before the Probate Act of 1857, the precise status of an administrator was that of an officer of the Ordinary, 1 *Wms. Executors* 403; but he was not thereby excused from accounting in Chancery. Now the proceedings, in which the costs complained of were incurred, had not been sanctioned by the order of the Court. They had been undertaken by Mr. Haldan, presumably in the belief that they were for the interest of the estate, but upon his own responsibility. There is no reason, then, why any exemption should be extended to him more than to other persons who have assumed a fiduciary capacity. Both reason and authority shew that a person invested with his powers, and exercising them so independently, is bound to account to the persons entitled to the property he has received, and this he has never done.

The plaintiff Wilson, whose duty it is, as one of the executors of the estate, to see that the whole assets are properly administered, was not represented upon the reference to the Master, by which it is now sought to prevent farther enquiry, at least, unless he can shew fraud or mistake. It seems to me that it would be contrary to the plainest principles of equity to force him into any such

position. It is sufficient for him to say: This defendant was entrusted for a time with the estate of which I am one of the trustees; he has never accounted to me for his dealings with it; and I now desire an account. There is much reason for concluding that even his co-plaintiff had not a fair opportunity of contesting the propriety of the charges upon the estate, which are now impeached. It would seem to be beyond dispute that the view taken by the taxing officer was, that he had no right to be present upon the moderation of the bills of costs which Mr. Haldan had paid. Even before us it was contended that the estate was bound, because it was adequately represented by Mr. Haldan, who was acting on that particular occasion by an independent solicitor. But upon the evidence of Mr. Donovan himself, it is not too much to say that this taxation was little better than a travesty of fair accounting. The solicitors, who appeared at different times for Mr. Haldan, were really nominated by Mr. Donovan. According to his view he arranged with them to act upon agency terms, that is, dividing the fees with him in some proportion. If his view be correct, the case simply is, that the estate, which had an interest in reducing his demands, was represented by his nominee, on those occasions, when the appearance of a representative, independent in appearance if not in fact, was deemed expedient. We must hold that the result of such a mode of procedure has no title to the name of a settled account, and that the plaintiffs have still the right to an investigation. The objection that the plaintiffs should proceed by petition in the suit of *Wilson* v. *Wilson*, is quite untenable. James Wilson was no party to that suit, and indeed it would not be absolutely incorrect to say that neither of the plaintiffs was a party, for Beatty did not represent in it the beneficiaries under the first will, and therefore appeared in a different character. If the plaintiffs are willing, as we understand they are, that the enquiry should be limited to the bills of costs and other dealings between Haldan and Donovan, the decree may be drawn up in that form. Having regard to the frame of

the bill, in which the plaintiffs' true equity is only obscurely shadowed forth, and to the reasons of appeal, which expressly complain of the refusal to amend, and of the rejection of evidence directed to the opening up of the accounts, we cannot give the plaintiffs any costs up to the hearing, or of this appeal, and subsequent costs must be reserved to be dealt with by the Court of Chancery, according to its usual practice.

We now turn to the case against the defendant Donovan. We think that the bill cannot be sustained as against him. If Haldan has improperly paid him costs out of the assets of the estate, the former is liable, and they must settle the matter between themselves. As between the plaintiffs and Donovan, there is no privity of any kind. Upon this the case of *Pearson* v. *Maw*, 28 Beav. 196, is a decisive authority. It was proper, therefore, that as against him the bill should be dismissed. But it is urged that in this view he ought to have demurred, and it would certainly seem that if he had taken that course judgment would have been in his favour. This case does not require us to discuss, what now seems to be *vexata quæstio*, the right to costs where a defendant answers instead of demurring. Here this defendant did not choose to demur, because he wished to repel aspersions upon his character, but at the trial he objected to the plaintiffs entering into evidence because their charges were too vague and indefinite, and when an amendment was asked, he declared himself unprepared to meet the new case. Under these circumstances, we are inclined to the opinion that he ought not to have recovered more than the costs of a successful demurrer, and we venture to think that if this point had been properly raised, the Vice-Chancellor would probably have so ordered. Of the full costs awarded to him in the Court below, we do not now deprive him, but in dismissing the appeal against him, we do so, without costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

ARMSTRONG V. MCALPINE ET AL.

Will, construction of—Restraint upon alienation—Costs.

The testator, after devising the use and control of all his property, real and personal, to his wife until his two sons, W. and H., were twenty-one, divided his farm between W. and H., to be possessed by them when respectively of the full age of twenty-one, subject to certain legacies to his daughters. The will then proceeded, "also my two sons H. and W. above named, give my beloved wife a comfortable support, or the sum of ten pounds annually during her natural life, said support or annuity to commence at the time my said younger son H. shall possess his share of said property. I also will that my above-named sons W. and H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered.

Some years after attaining his majority, H. mortgaged to the defendant McAlpine without his mother's consent, and having made default in payment the land was advertised for sale.

Upon a bill filed by the mother, a decree was made, declaring that according to the true construction of the will H. had no power to sell, transfer, or mortgage the land in question without her consent in writing, and McAlpine was restrained from selling.

Held, reversing the decree of BLAKE, V.C., (without deciding whether such a restraint upon alienation without a gift over was effectual, because the plaintiff had no right to require its determination, and if adverse to her contention such an opinion would not bind the heirs), that she was not entitled to reside upon the land, and thereby prevent its alienation, since there was the option of paying her in money, and the mortgage did not interfere with her right to this payment as a charge upon the land.

As the defendant had offered to give the plaintiff a decree for a charge on the land, she was ordered to pay the costs up to and inclusive of the decree; but the appellant, not having taken the objection which was given effect to in his reasons of appeal, was refused the costs of the appeal.

Observations on *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4.

This was an appeal from a decree of Blake, V. C.

The bill was filed by the widow of the testator, to whom he gave the use and control of all his property, real and personal, until his two sons, William and Henry, were of the age of twenty-one years, or until the said property should be disposed of as thereinafter mentioned.

He gave to his son William the north half of his farm, to be possessed by him when of the full age of twenty-one years, and directed him to pay certain pecuniary legacies to three of his daughters. He gave his son Henry the south part of the farm, to be possessed by him when

of the full age of twenty-one years, and directed him to pay pecuniary legacies to two of his daughters.

The will then proceeded in the following language: "Also, my two sons, Henry and William, above named, give my beloved wife a comfortable support or sum of ten pounds, each, annually, during her natural life, said support or annuity to commence at the time my said younger son, Henry, possesses his share of said property. I also will that my above-named sons, William and Henry, do not sell or transfer the said property without the written consent of my said beloved wife, Eleanor, during her life."

Some years after attaining his majority, Henry mortgaged to the defendant, McAlpine, without his mother's consent, and having made default in payment, the land was advertised for sale.

The plaintiff then filed her bill, alleging the above facts, and that in reliance on the provision made in the will, and under the belief that she was entitled to remain on the land, as she had done with Henry since her husband's death, and to prevent him selling, disposing of, or transferring the same during her lifetime, she had not made any demand for an allotment of dower. She, therefore, prayed a declaration that Henry had no power to sell, transfer, or mortgage the land without her consent in writing, and for an injunction to restrain McAlpine from selling or dealing with it to her prejudice. She then moved for an injunction in terms of the prayer, and affidavits in verification of the allegations in the bill. One of the affidavits also proved statements by the testator at the time of the preparation of his will, tending to shew that he desired to guard against the possibility of his sons leaving his widow without provision, and that the object of the restriction upon alienation was to secure her a proper support and maintenance, and to prevent the possibility of her ever coming to want by enabling her to retain the land in the family during her lifetime.

This motion was, by consent, turned into a motion for a a decree, when it was declared that according to the true

construction of the will Henry had no power to sell, mortgage, or transfer the land during the plaintiff's life without her consent in writing, and an injunction was awarded against both Henry and McAlpine, restraining the sale, transfer, or mortgage, during that period without such consent.

The defendant McAlpine, appealed from this decree.

The case was argued on the 7th March, 1879 (*a*).

Bethune, Q. C., for the appellant. The defendant McAlpine has never pretended that he could hold the land except subject to a charge in favour of the plaintiff, for a proportionate part of her support, or for the payment of the allowance given in lieu thereof, and he offered to give her such a decree. The Court of Chancery had no right to interfere in such a case as this, as the plaintiff's interest is not invaded, and she can only seek the assistance of the Court to protect herself. The question is raised whether the condition is such a one as to work a forfeiture, or one that is void. It is submitted that inasmuch as there is no gift over the restraint against alienation is void, and its violation did not deprive Henry Armstrong of the estate: *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4; *Theobald* on Wills, 316; *Jarman* on Wills, 17 40, 53, 3rd ed.; *Churchill* v. *Marks*, 1 Coll. C. C. 441; *Holmes* v. *Godson*, 8 DeG. M. & G. 156; W. & T.'s L. C. 861; *In re McLeay*, L. R. 20 Eq. 183. *McWilliams* v. *Nisly*, 2 Sargeant & Rawle, 507, will be referred to by the respondent, but that decision is opposed to the English cases, and must be treated as bad law.

Boyd, Q. C., (with him *O'Leary*), for the respondent. The will is intended to prevent Henry Armstrong from disposing of the land during his mother's life, without her consent, and we submit that such a restriction is valid without any devise over. The only question is, whether the alienation is restrained for a reasonable time:

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Preston on Estates, 478; *Doe* v. *Carter*, 8 T. R. 57, 60; *Touchstone*, vol. 1, p. 129; *Simons* v. *Simons*, 3 Met. 562; *Pennyman* v. *McGrogan*, 18 C. P. 133; *McWilliams* v. *Nisly*, 2 Sargeant & Rawle, 507; *Ex parte Dickson*, 1 Sim. N. S. 37; *Evanturel* v. *Evanturel*, L. R. 6 P. C. 1 ; *Harvey* v. *Aston*, 1 Atk. 361; *Powell* on Devises, vol. 2, pp. 266, 296. The case of *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4, was argued *Ex parte*, and the opinion of the Privy Council by the Judge who decided *Atwater* v. *Atwater*, 18 Beav., 330, which has not been followed. But even if well decided, it is not applicable to this case.

May 20, 1879 (*a*). Moss, C. J. A., delivered the judgment of the Court.

The question principally discussed before us was, whether a restraint upon alienation contained in the will of Henry Armstrong was void, as being repugnant to the estate devised. That question is of great interest and importance; but before reaching it we have to consider whether the plaintiff has the right to require its solution.

It was not, and it is not now, disputed, that she is entitled to a charge upon the land for a proportionate part of her support, or for the payment of the allowance in money given in lieu thereof.

We are not sure that the learned Vice-Chancellor expressed any opinion upon the question of the validity of the attempted restraint. As we understand Mr. O'Leary, who was one of the counsel for the plaintiff upon the hearing before the Vice-Chancellor, the judgment was mainly founded upon the right to live upon the property, which, from the affidavits, the Court thought the testator intended her to enjoy. We cannot but think that there must be some misapprehension by the learned counsel of the Vice-Chancellor's views. We take it to be quite certain that he could not have held McAlpine to be affected by any parol evidence of the testator's intentions, or by anything but

(*a*) *Present*.—Moss, C.J.A., Burton, Patterson, and Morrison, JJ.A.

the terms of the will itself. With regard to the interpretation of the will, we have reason to believe that there was a common impression, after the decision by the Judicial Committee, in *Renaud* v. *Tourangeau*, L. R. 2, P. C. 4, that such an attempt at restricting alienation, unless followed by a gift over, was ineffectual. The Court there thought that general principles of jurisprudence were opposed to the validity of a mere naked restriction upon alienation, a *defense d'aliener pur et simple*. But the reasoning of the Master of the Rolls, in *In re McLeay*, L. R. 20 Eq. 186, as well as the opinions in some of the older treatises on real property, possessing a recognized authority, and decisions in the Courts of the United States, to which we were referred by Mr. Boyd, in his very able and learned argument, may seem to show that the question is still open for consideration. But we think that it would not be proper for us at the instance of the plaintiff to attempt to decide it. She has not, so far as we can perceive, any legal right to require its determination. It is to her quite immaterial whether Henry could, or could not make an effectual mortgage.

His act could not impair or affect her rights, for they are paramount to any which he could create. Her rights are regulated by the terms of the will, which is registered, and of the contents of which notice is thus given to all the world. She has no indefeasible right to reside upon the land, and thereby prevent its alienation, for there is the option of paying her an annuity in money, and with her right to this payment as a charge upon the land the mortgage does not interfere.

The Court should not, at the instance of the plaintiff, pronounce an opinion upon the effect or validity of this clause, because, if adverse to her contention, it would not bind the heirs. Any right there may be to complain of Henry's act resides in them, and for all we know they are not disposed to question it.

We think, therefore, the appeal must be allowed, and the bill dismissed. As the defendant offered to give the plantiff all to which we consider her entitled, namely, a decree for

a charge upon the land, if that were necessary, we cannot relieve her from the penalty of paying costs up to and inclusive of the decree; but as the appellant has not chosen to take, in his reasons of appeal, the objection to which we give effect, we refuse him the costs of the appeal.

Appeal allowed.

Rooney v. Rooney.

Trinity Term—Sittings of the Court dispensed with—When rule nisi to be moved—Power of Court.

Held, affirming the judgment of the Common Pleas, 29 C.P. 347, that when the Court has dispensed with its sittings during Trinity Term, motions for new trials in cases tried at the Summer Assizes at Toronto, need not be made within the first four days of that Term, since under section 13 of R. S. O., ch. 39, such a motion may be made at any time during vacation (which includes Trinity Term) to a single Judge sitting for the Court. But if a party delays to move till after the fourth day of Trinity Term, he runs the risk of judgment being entered, (which may be done on the fifth day of that Term) and if judgment is entered then, he is precluded from moving.

Per Burton, J. A.—Under R. S. O., ch. 50, sec. 284, the Court has no power to entertain such motions after the expiration of the four days mentioned therein.

Semble, per Patterson, J. A., that, notwithstanding that section, the Court still possesses a discretionary power in such cases.

This was an appeal from a judgment of the Court of Common Pleas, making absolute a rule *nisi* to set aside the verdict for the plaintiff, and enter a nonsuit, reported 29 C. P. 347. The facts are fully stated there, and in the judgment on the appeal.

The case was argued on the 14th May, 1879 (*a*).

McMichael, Q. C., for the appellant. The Court below had no power to interfere with the verdict in favour of the defendant, as the plaintiff did not move against it within the first four days of the term next after the verdict: R. S. O. ch. 50, sec. 284. It is immaterial that

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the Court dispensed with its sittings during Trinity Term, as by sec. 13, R. S. O., ch. 39, they provided that in such a case rules *nisi* should be granted by the Judge sitting for the full Court; and the fact that under section 298, judgment could have been entered on the fifth day of Trinity Term, strengthens our contention that the motion must be made within the first four days of that Term. Whatever discretion the Court may have had to extend the time for moving, it is submitted that now that the rule is embodied in a statute, they no longer possess such power. He cited *College of Christ* v. *Martin*, L. R. 3 Q. B. D. 16; *Lawson* v. *Laidlaw*, 7 P. R. 166: *Smith* v. *Rooney*, 12 Q. B. 661.

J. Haverson, for the respondent, Under section 13 of R. S. O. ch. 39, the plaintiff was not confined to the first four days of Trinity Term, but could move in this matter at any time during *vacation*, which period includes the Trinity Term. But independently of this section, the Court had power in their discretion to issue the rule *nisi* after the first four days, since the section 284 of R. S. O. ch. 50, does not deprive the Court of the power to grant such an indulgence, which, it is conceded, they possessed when the provision contained in that section was a rule of Court. That this is the true construction, clearly appears when the section is read in connection with other enactments: R. S. O., ch. 49, secs. 8, 45; R. S. O., ch. 50, secs. 332, 334, 335. He cited *Johnson* v. *Warwick*, 17 C. B. 516; *Hood* v. *Harbour Commissioners*, 33 U. C. R. 148.

27th May, 1879 (*a*). BURTON, J. A.—The sole question raised upon this appeal is, whether the Court of Common Pleas had power to make a rule for a new trial absolute in a case in which a verdict had been rendered at the Summer Assizes for the County of York, inasmuch as the plaintiff, against whom the verdict was rendered, had not moved within the first four days of Trinity Term, the

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

term next after the verdict, the Court of Common Pleas having dispensed with its sittings during that term under the R. S. O. ch. 39, sec. 13.

The Chief Justice, in delivering judgment in the Court below, intimated that they would have experienced no difficulty but for a supposed change in the law under the Revised Statutes, substituting a positive enactment for what, in the opinion of the learned Chief Justice, was previously a mere rule of practice.

As an instance of the supposed elasticity of the rule previously, he refers to the extension of the time for hearing such motions at the time of the rebellion in 1837; but it is to be observed that that was long before there were any written rules on the subject.

I venture, however, to think that even in those days the rule was very rigidly adhered to, and the supposed occasions when the extension of indulgence was granted to parties whose counsel or papers were delayed by the non-arrival of the boat or stage, were few and far between.

We find that in England, long before the adoption of the Rules of Practice under the Common Law Procedure Act, from which our own were framed, the practice was most rigidly enforced, so much so, that in Lord Tenterden's time the Court would not hear any motion for a new trial unless it were *actually made* within the first four days of the term, and even if counsel were instructed within the first four days, and there was not time to hear them on the fourth day, the Court would not hear them afterwards.

In the early part of the reign of George II., the Court did grant a rule after the four days, but declared that for the future no such motion should be made except within the limited period, "unless the foundaton of the motion were a fact not disclosed to the party till after that time."

That case is reported in *Barnes*, and in 1863 in *Gambart* v. *Mayor*, 14 C. B. N. S. 320, on a motion made after the four days on a suggestion of perjury on the part of the defendant and his witnesses, and that fresh evidence had been discovered since the expiration of the time for moving,

the Court refused to grant a rule, Byles, J., remarking, "This has never been allowed since Barnes's time, except where counsel has by mistake moved in the wrong Court, and so inadvertently let the time for moving slip by."

The case of *Johnson* v. *Warwick*, 17 C. B. 516, referred to on the argument, was in fact a case of that kind. The Chief Justice intimated that common courtesy required that advantage should not be taken of a slip of the opposing counsel in moving in the wrong Court, and the matter then dropped, although it was there urged that being a statutory rule, the Court had no discretion, but after that intimation of opinion, counsel had not the bad taste to persist in the objection.

The written rules regulating the time for moving for new trials, were first adopted after the passing of the Common Law Procedure Act, which enabled the Judges of both Courts, or any four, of whom the Chief Justices should be two, to make rules, and provided that all such rules should be laid before Parliament, and should thereafter be binding and obligatory, and of the like force and effect as if the provisions contained therein had been expressly enacted by Parliament. It has been generally assumed that these rules had the effect of statutory enactments, but, however that may be, I think it will be found that they have been rigidly adhered to, and no motion allowed after the four days except in the instance of a party accidentally moving in the wrong Court.

I have good reason to remember this in a case of my own when in practice: *Kitchen* v. *McIntyre*, 16 C. P. 484. In that case a verdict for a large amount had been rendered against my client without any evidence to warrant it, and although I moved within the four days, and had taken the steps pointed out by the statute to have the record in Court at the time of moving, the Court refused the motion because the affidavit shewing that these steps had been taken, was not in Court "within the time for moving," *i. e.*, the first four days, although the Judge who tried the cause entertained a very strong opinion against the justice of the verdict.

If the practice at that time had any of the elasticity, and the Court the discretion, which the learned Judge supposes, one can hardly imagine a stronger case for its exercise.

It is not easy, therefore, to see, consistently with the decisions since the adoption of these rules, and even previously to their adoption, how the Court could grant the rule for a new trial in this case, if the matter is to be governed by sec. 284; and the question appears to resolve itself into whether sec. 13 of the R. S. O. ch. 39, (which enables the Judges to dispense with sittings during Trinity Term,) has not made separate and independent provisions in such case for motions for rules *nisi* for new trials when verdicts have been rendered at the Summer Assizes, and so excepted them, as it were, from the operation of sec. 284.

In the event of a rule being granted, it cannot be argued and disposed of before the ensuing Term of Michaelmas; and although under sec. 298 of ch. 50 the party in whose favour the verdict has been rendered may enter judgment on the 5th day of the term next following the verdict, there would seem to be nothing in the Statute to prevent the vacation Judge sitting for the Court exercising the power which it undoubtedly possessed before the rules of 1856 to entertain a motion for a new trial at any time before judgment is actually entered.

The Act does not restrict the vacation Judge to the exercise of his powers within the time limited for the motion if the Court had been in session in Trinity Term, but authorizes him generally to entertain the application and grant a rule *nisi* during vacation to be set down for argument during Michaelmas Term. I can see no good reason why the Judge should not exercise the power at any time before Michaelmas Term, so long as judgment has not been entered; and I think no injustice can be done by placing that construction upon sec. 13, which does no violence to its language, and is consistent with the

practice which the Chief Justice of the Common Pleas regrets has ever been infringed upon.

As the matter cannot be disposed of before Michaelmas Term in any event, it can be of no importance to the suitor whether the rule is granted before or after the fourth day of Trinity Term, and as the Legislature has not thought fit to restrict the power of the vacation Judge to the first four days of a term in which there are to be no sittings, I do not think we should take upon ourselves to do so. I am of opinion that the rule was properly before the Court of Common Pleas for consideration.

In this view of the matter, the case cited by Dr. McMichael, *College of Christ* v. *Martin*, L. R. 3 Q. B. D. 16, has no application. There an Act of Parliament required an award to be moved against before the last day of the ensuing term. By subsequent legislation terms were abolished, but were allowed to be referred to in all cases in which they were used as a measure for determining the time within which an act required to be done.

Here the term is not abolished but the sittings only dispensed with, and I take it to be clear that on the fifth day of that term this defendant could have entered judgment, but the plaintiff has a right granted to him to move to set aside that verdict before a vacation Judge, without any restriction, so far as I can ascertain, except that it must be before Michaelmas Term. He did so move and obtain a rule *nisi* before judgment entered, and that rule has been made absolute by the full Court, which had, I think, full jurisdiction to entertain it.

Upon the point that no leave of a Judge or of the Court can contravene the express provisions of a statute, where the time for moving is limited by statute, I may refer to *Tennant* v. *Rawlings*, L. R. 4 C. P. D. 133.

The appeal should, I think, be dismissed, with costs.

PATTERSON, J. A.—The contention for the appellant is, that a motion for a new trial, after a verdict rendered at

the Summer Assize in Toronto can be made only within the first four days of Trinity Term, even when the Court does not sit during that term; that effect being ascribed to section 284 of the Common Law Procedure Act, R. S. O. ch. 50; and that therefore when the rule *nisi* was moved before Mr. Justice Gwynne, sitting alone for the Court, on 3rd September, 1878, the eighth day of the term, and when he ordered the motion to stand over till Michaelmas Term, and when in Michaelmas Term the rule *nisi* was granted, and afterwards made absolute, the whole matter was *coram non judice.*

Section 284 directs that subject to the provisions of the two following sections (which relate to trials in term and to cases in which a Judge reserves his decision) all motions respecting the trial or verdict shall be made, in the Superior Courts, within the first four days, and in the County Courts within the first two days, of the term next following the trial.

It is argued that this forbids the reception of such a motion in all cases except during the designated periods, and deprives the Courts of any power to relieve against any mischance that may cause delay beyond those limits.

It is urged that the limitation of time formerly depended upon a general rule made by the Courts themselves, and that whatever elasticity such a rule possessed is absent when the law takes the rigid form of a Statutory mandate.

I am not convinced that the rule is more stringent than it used to be, or that it is clothed under the Revised Statutes with greater legislative force than it possessed before.

It is true that it was not formulated in direct terms in the former Statutes, and was only found in such a shape in the rules of Court made under legislative authority; but it had been fully, adopted as part of the law of the land and had received express legislative recognition in many ways.

Thus the Common Law Procedure Act, as contained in the C. S. U. C. ch. 22, in sec. 228 (now sec. 279), required

every deputy clerk of the Crown, after notice, to transmit the Nisi Prius record to Toronto; and declared that if after such notice the record should not be in Court *at the time of moving* any rule requiring reference thereto, the party moving might, on filing a certain affidavit, be allowed to move without the production of the record.

This speaks only of the *time of moving;* but the decision of the Court of Common Pleas, in *Kitchen* v. *McIntyre*, 16 C. P. 485, shews that what was meant was the first four days. In that case the record had not arrived on the fourth day, and the party moving was not provided with the requisite affidavit. On the sixth day he again moved on affidavits which demonstrated that he had been in no fault, but that the absence of the record arose entirely from an accidental oversight of the deputy clerk. At this time of moving the record was in Court. The Court took time to consider, and Richards, C. J., gave judgment refusing the rule, saying: "On looking again at the statute, we think that the material on which to move should all be ready and filed before the expiration of the fourth day of term, and that not being so, we regret we cannot grant the rule."

This decision seems to bear against the existence of any discretion to receive a motion for a new trial in a country cause, and perhaps equally so in a town cause; because a stronger case could not possibly have been made for the accordance of relief if the power to give it had been considered to exist. However this may be, the decision clearly reads the statute as treating the words, "time for moving" and "first four days," as convertible terms.

Section 238, like the present section 298, fixed the fifth day of term in the Superior Courts, and the third day in County Courts as the day on which final judgment might be entered. As to which we may notice in passing, that the right to enter up judgment on these days is given in absolute terms; yet no one ever doubted the power of the Court to suspend its exercise by granting a rule *nisi* to set aside the verdict or nonsuit with stay of proceedings, or by making an order to stay proceedings for any cause.

And section 242, now 301, which gave power to vacate a judgment entered upon an order for speedy execution, expressly declared that the application must be made within the first four days of term.

Then we have a similar adoption of the time in sections 25 and 27 of the Administration of Justice Act of 1874, which now appear as sections 284 and 285 of the Common Law Procedure Act, and which required the motion in cases tried in term or before a Judge to be within the first four days of term, unless in the exceptional instances which those sections were passed to provide for.

Thus it appears to me that when section 284 designated four days and two days in the Superior and County Courts respectively, as the part of the term in which these motions were to be made,—and when it did so in terms which were not of the prohibitory character applied to District Courts in the Statute 8 Vic. ch. 13, and still applied to County Courts in sec. 292 of the Common Law Procedure Act forbidding them to entertain a motion after the rising of the Court on the second day—it merely enunciated the law as it was and as it had long existed under direct legislative recognition.

The rule, even when it existed only in the practice of the Courts, was always regarded as one to be relaxed only upon very special occasions; yet, even after it had obtained express legislative recognition, it was in proper cases relaxed: see *Bank of Montreal* v. *Bethune*, 4 O. S. 303; *White* v. *Church*, 4 U. C. Q. B. 23; *Kitchen* v. *McIntyre*, 16 C. P. 484; *Johnson* v. *Warwick*, 17 C. B. 576; *Sutton* v. *Craig*, 4 L. T. N. S. Ex. 217.

The decision in *Kitchen* v. *McIntyre*, 16 C. P., might seem to indicate that the effect of our legislation had been to place the rule beyond the range of judicial discretion. For the disposition of the present appeal, it is not in my judgment necessary to decide whether that was the effect or not, for reasons which I have yet to state. I think, however, that the effect of the law under the Revised Statutes is not more stringent than it was before; and as to *Kitchen* v.

McIntyre, I cannot believe it was intended to deny the discretionary power of the Court, however difficult it may be to explain the decision on other grounds; because it was pronounced by a Court one member of which was the learned Chief Justice who, in delivering the judgment now in review, has emphatically asserted the right of the Court to exercise the power in question, and whose judgment in *Hood* v. *Harbour Commissioners,* 33 U. C. R. 148, contains an expression of the same views.

We are dealing with the case of a verdict rendered at the Summer Assizes, and with the circumstance that under the power conferred by section 13 of the Act respecting the Courts of Queen's Bench and Common Pleas, R. S. O. ch. 39, the Court of Common Pleas had, by a rule made in Easter Term, 1878, directed that that Court should not sit during the time appointed by that Act for holding Trinity Term. Under that section the motion "may be made before and heard by the Judge sitting for the full Court during vacation under sections 20 to 24 of this Act." Now, I agree with what I gather to be the opinion of the learned Chief Justice of the Common Pleas, that the words *in vacation* refer to the time of sitting, and include the period of Trinity Term, the enactment being equivalent to a statement that the motion may be made to a Judge holding what has come to be called the Single Judge Court. But I see no good reason for refusing to the words "in vacation" their natural and ordinary meaning, or for confining them to the term during which the Court does not sit, although that period of time is evidently, though perhaps not quite accurately, intended to be covered by them.

A motion before the full Court must necessarily be made in term, as that is when the full Court sits. This necessity compels delay in moving a verdict rendered in vacation. The delay is a matter of necessity, not of principle. Neither principle nor necessity requires delay when the motion may be made in vacation. Section 13, read by itself, authorizes the motion for a new trial at any time from the rendering of the verdict until final judgment is

entered; just as in the times before the English Rules of 2nd Wm. IV., a motion in arrest of judgment or for judgment *non obstante veredicto*, might have been moved at any time before judgment entered up: 1 *Sellon's* Practice, 521; *Tidd's* Practice 928.

Then, is this general effect of section 13 restrained by any other enactment? The only one to which such an effect can be attributed is section 284 of the Common Law Procedure Act, which says that a new trial shall be moved for within the first four days of term.

I entirely adopt the view that although the Court does not sit during Trinity Term, still the period of time designated as Trinity Term, must for various purposes be recognized as Trinity Term; and for the purpose, amongst others, of section 298, which contains the enactment that the party who had the verdict may enter final judgment on the fifth day of term.

At the same time it is obvious that section 284, in fixing the first four days of term, has in contemplation a motion before the Court which only sits in term. Its guiding principle is, that the motion must be made within four days of the time when it first becomes possible to make it. I perceive no inconsistency between this and section 13 of the other chapter, which says that in a case like the present the motion may be made in vacation. The two sections are dealing with different things. Section 284 governs cases tried at the Summer Assizes only, when the Court sits in Trinity Term. When the Court does not sit in that term, these cases are governed by section 13, just as if they had been in express terms excepted from the operation of section 284.

It follows that in a case like the present a motion for a new trial may be made immediately after the verdict is rendered, or deferred till a later time. The party against whom the verdict stands, or a plaintiff who has been nonsuited, is safe until the fourth day of Trinity Term, because judgment cannot be entered till the fifth day. After that he delays moving at the risk of being precluded by the

entry of judgment; but subject to that risk the right of moving would seem to remain.

I am not discussing the policy of the law or the expediency of confining the time for moving after the Summer Assizes within narrower limits. The construction I have placed upon the law as it stands is, in my opinion, not only one of which it is fairly susceptible; but it is the most natural and direct rendering of its terms. I find nothing in the Statutes, and certainly no principle of law, to require a different reading. Even the provision of section 280 for delivering the record to the party entitled to the *postea* when the *time for moving* has expired, is aside from the question, because it applies only to country causes.

For these reasons I think the appellant has failed to establish that Mr. Justice Gwynne, in receiving the motion, or the Court in granting the rule, exceeded their authority.

I therefore agree that the appeal should be dismissed, with costs.

MOSS, C. J. A., and MORRISON, J. A., concurred.

Appeal dismissed.

Foreign judgment—Pleading—23 Vic. ch. 24, sec. 1; 31 Vic. ch. 7, O.; 31 Vic. ch. 1, sec. 6, sub-sec. 34.

To an action on a foreign judgment commenced previous to the repeal by 39 Vic. ch. 7, O., of 23 Vic. ch. 24, sec. 1 (which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit, the defendant, after the passing of the repealing Act, pleaded several pleas, setting up such defences.

Held, reversing the judgment of the Common Pleas, that they could be pleaded, as the right to plead was an "existing right" within the meaning of sec. 6, sub-sec. 34 of the Interpretation Act, 31 Vic. ch. 1, O.

A further plea to the judgment averred that the defendant was not, at the commencement of the action, nor down to the judgment, resident or domiciled in the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of judgment, have any notice or knowledge of any process or proceedings in the action, nor any opportunity of defending himself therein.

Held, affirming the judgment of the Court of Common Pleas, that the plea was bad for not averring that the defendant was not a subject of the foreign country, and not amenable to its jurisdiction.

THIS was an appeal by the defendant from a judgment of the Court of Common Pleas, holding the second, fifth, ninth, and tenth pleas bad, reported 27 C. P. 417. The pleadings are fully stated there, and in the judgment on this appeal.

The appeal was argued on March 14th, 1878 (*a*).

C. Robinson, Q.C., (*Bruce*, with him,) for the appellant. It is admitted that but for 31 Vic. ch. 1, these pleas could not have been pleaded, but we contend that this Act preserves our right to plead to an action already commenced the same defences we might have pleaded before the passing of the Act repealing 23 Vic. ch. 24. A right of defence is just as much a *right* as a right of action, and sec. 34 of the Interpretation Act distinctly declares that the repeal of an Act shall not effect any *right*. At any rate the defendant had under section 34 an "accruing right," *i. e.*, to plead such a defence at the proper time.

(*a*) *Present.*—MOSS C. J. A., PATTERSON and MORRISON, JJ. A., and ARMOUR, J.

The Court below were wrong in placing a retrospective construction on the statute: *Walker* v. *Walton*, 1 App. R. 579; *Paddon* v. *Bartlett*, 3 A. & E. 884; *Wright* v. *Greenroyd*, 1 B. & S. 578; *Butler* v. *Palmer*, 1 Hill 325; *Bates* v. *Stearns*, 23 Wend. 482; *Hitchcock* v. *Way*, 6 A. & E. 943; *Re United Presbyterian Congregation of London*, 6 P. R. 129; *Re Chaffey*, 30 U. C. R. 64; *Sedgwick* on Constitutional Limitations, 2nd ed., 113, 114, 561; *Abbott's* Dig., vol. 11, p. 82. The cases shew that it is a clear violation of the principle on which statutes are construed to take away a right to a defence which the defendant was entitled to set up when the action was commenced. In *Barned's Banking Co.* v. *Reynolds*, 40 U. C. R. 435, which was decided the day before this case, it was held that the 39 Vic. ch. 7, did not interfere with the pleas which had been pleaded before it was passed. The Legislature could never have intended to save a right to a man if he pleaded it on Monday and take it away if he pleaded it on Tuesday. The ninth plea has been held bad because it did not allege that the defendant was not a subject. This, however, is the subject of a replication, if we are bound because we were a subject; but even if a subject, we allege that we were not served as the law required. They also referred to *White* v. *Clark*, 11 U. C. R. 137, 140; *Fowler* v. *Kirkland*, 18 Pick. 299; *Moon* v. *Durden*, 2 Ex. 52; *Manning* v. *Thomson*, 17 C. P. 606.

Kerr, Q. C., for the respondent. The absence of any saving clause in 23 Vic. ch. 24, shews that it was the intention of the Legislature not to allow such defences as those in question here to be set up at all. The statute was merely one of procedure, allowing such a plea to be put on the record, and the right was taken away by its repeal. The Interpretation Act has no application to this case. It was not a right existing, and a "right accruing" only applies to a right of action. See *Grantham* v. *Powell*, 10 U. C. R. 306; *Calcutt* v *Ruttan*, 13 U. C. R. 147. The ninth plea is clearly bad: *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155; *Godard* v. *Grey*, L. R. 6 Q. B. 139; *Copin* v.

Adams, L. R. 9 Ex. 345, 1 Ex. D. 17; *Ellis* v. *McHenry*, L. R. 6 C. P. 228; *Corporation of York* v. *City of Toronto*, 21 C. P. 95; *Story's* Conflict of Laws, secs. 556, 557, 559, 560; *Meyer* v. *Ralli*, L. R. 1 C. P. D. 369.

February 14, 1879 (*a*). PATTERSON, J. A.—The defendant appeals from the decision of the Court of Common Pleas, holding his second, fifth, sixth, and ninth pleas bad.

The declaration states that on the 5th March, 1872, Maria P. Beecher, administratrix of William A. Beecher, recovered a judgment in the Supreme Court of the State of New York for $2,953.30, and before this suit assigned it to the plaintiff.

The action was begun in 1873, but the defendant did not plead until 2nd October, 1876.

The second plea denies that Maria C. Beecher was or is administratrix, as alleged.

The fourth plea alleges that the cause of action for which the judgment was recovered, was a judgment recovered against the defendant by William A. Beecher, and that that cause of action did not accrue within twenty years before the commencement of the suit in the Supreme Court.

The allegation in the fifth plea is, that the defendant paid the judgment recovered against him by William A. Beecher before Maria P. Beecher brought her suit.

The sixth resembles the fifth, alleging that the debt was satisfied by one Salter to William A. Beecher.

And the ninth sets out that the action in the Supreme Court of new York by Maria P. Beecher was commenced according to the laws then in force in New York, by summons and complaint; that the defendant was not at the time of the commencement of such action, or at any time thenceforward previous to the recovery of the judgment resident or domiciled within the jurisdiction of the Supreme Court, or within the jurisdiction of the United States; and

(*a*) *Present.*—MOSS, C.J.A., PATTERSON, and MORRISON, JJ.A., and ARMOUR, J.

was not, at any time before the recovery of the judgment, served with any process or summons or complaint in the action, as required by the laws then in force in New York; nor had he before the recovery of the judgment any notice or knowledge of any process, summons or complaint, or any proceedings in the action; or any opportunity of defending himself therein.

In the case of *Schibsby* v. *Westenholz*. L. R 6 Q. B. 155, and *Godard* v. *Gray*, L. R. 6 Q. B. 139, which immediately precedes it in the same volume, the general law concerning foreign judgments was very fully considered.

Blackburn, J., who delivered the judgment of the Court in each case, expresses the opinion (at p. 159,) that, for reasons which he had given: "the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell* v. *Smyth*, 9 M. & W., at p. 819, and again repeated by him in *Williams* v. *Jones*, 13 M. & W., at p. 633, that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce." This expression is rather stronger than the necessary import of the words of Parke, B., who merely says, that an action of debt to enforce the judgment may be maintained, or that the obligation to pay may be enforced in this country. But the extent to which the binding character of the foreign judgment is recognized cannot be more distinctly shewn than by such cases as *Castrique* v. *Imrie*, L. R. 4 H. L. 414, and *Godard* v. *Gray*, L. R. 6 Q. B. 139, in which the foreign judgment which the English Court felt bound to enforce had proceeded upon a mistaken notion of English law.

This declaration, therefore, clearly sets out a good cause of action, as it shows a judgment recovered against the defendant in a foreign Court; and the burden is upon the defendant to shew why this judgment should not be enforced.

Let us first consider his ninth plea.

We find the principles on which it must be tested stated in the judgment of Blackburn, J., to which I have referred. At p. 148 he says, after quoting the language of Parke, B., in *Williams* v. *Jones*, 13 M. & W. 633: "And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action." And again he says (at p. 161): "Now on this we think some things are quite clear on principle. If the defendants had been, at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time when the suit was commenced, resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before finally deciding this we should like to hear the question argued. But every one of those suppositions is negatived in the present case."

This ninth plea does not negative the position that the defendant may have been a citizen of the United States. In giving judgment it was said by Gwynne, J., at p. 426: "We think the ninth plea bad, for not averring that the defendant was not a subject of the foreign country * * nor amenable to its jurisdiction, although absent from it, for if he was, then, upon the authority of *Schibsby* v. *Westenholz*, the judgment recovered will be binding on him." And Hagarty, C. J., said, at p. 427: "If this were *res integra*, I think I should hold the plea sufficient *primâ facie* to put the plaintiff on a replication showing how the judgment had been properly recovered against the defendant. But I think the authorities are to the effect that the plea is insufficient. It states that the suit was commenced

by summons and complaint, and that he never was served with any process or summons or complaint, as required by the laws then in force, nor had he notice or knowledge, &c. For all that is alleged, the process may have been served, not personally, but by advertising or posting in some place, or by service on some agent, or at some last place of residence, or in some other way allowed by the local law; and yet the defendant may still with truth aver, as in his plea, that he was not served and had no knowledge."

I agree with the opinions thus expressed, and they so nearly cover all the ground that I have but little to add to them.

The result of the more recent decisions is very well stated by Mr. Edmund H. Bennett in a passage contributed by him in his edition of *Story's* Conflict of Laws, 7th ed., 1872, sec. 606 *a*. It reads thus: "This subject has been much discussed in England of late, and the well established English doctrine is, that a foreign judgment is only *primâ facie* evidence in England upon the question whether the foreign Court had jurisdiction of the subject matter or of the person of the defendant, or whether the judgment was regularly obtained; but that it is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it was founded were never made, or were obtained by fraud of the plaintiff; and it is held that any pleas which might have been pleaded to the original action cannot be pleaded to the action upon the judgment."

The Court has "jurisdiction of the person" of the defendant when he is a subject of the country, even though not resident or domiciled in it; and he is therefore (under the English law) bound by a judgment recovered under the process of the country to which he owes allegiance.

This is clearly shewn in the elaborate and exhaustive judgments delivered in the cases of *Godard* v. *Gray*, L. R. 6 Q. B. 139, and *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, and in other cases cited in the Court below.

Those cases, however, do not directly touch the question of pleading with which we are just now concerned.

The principal question in *Godard* v. *Gray* was, the right to review the foreign judgment upon the merits. In *Schibsby* v. *Westenholz* the plea did state that the defendants were not natives of the empire of France; and the discussion of the law was upon the argument of a rule to enter a verdict for the defendants. The judgment in *Maubourquet* v. *Wyse*, Ir. 1 C. L. 471, turned on the effect of the plea and replication read together.

But the exact point is covered by other cases, of which it will be sufficient to refer to *Cowan* v. *Braidwood*, 1 M. & G. 882. It is there said by Maule, J., at p. 894: "The declaration being in the ordinary form is sufficient, and the plea ought to have disclosed something in answer to it. The answer suggested by this plea is, that the decree mentioned in the declaration is void; but in order to establish that, the defendant ought to have alleged circumstances shewing either that the decree was not binding in Scotland, or that he ought not to be bound by it here, such decree being contrary to natural justice: as in *Buchanan* v. *Rucker*, 1 Camp. 63, 9 East 192. The defendant has not attempted to set up the former proposition, and has failed in establishing the latter. * * Here there is a declaration in assumpsit, founded on a good consideration, namely, a decree of the Scotch Court; and the plea, in order to be an answer to it, should show that under no circumstances can the decree be good."

Tindal, C. J., said, at p. 892: "He ought to have introduced into the plea allegations which would have brought this case within those decisions in which parties have been held not to be affected by foreign judgments obtained against them in their absence. But here there is no statement that the defendant was not resident in Scotland, or that he was not subject to the laws of that country during the time that these proceedings were had against him." Similar language was used by Bosanquet, J., and Coltman, J.

We must therefore affirm the judgment of the Court of Common Pleas as to the ninth plea.

The other pleas, viz., the second, fourth, fifth, and sixth, present a very different question for adjudication.

They all set up defences which might have been pleaded to the original action.

The only authority for pleading them is to be found in the Statute of Canada, 23 Vic. ch. 24, the first section of which contained the enactment that in any suit brought upon a foreign judgment any defence set up, or that might have been set up to the original suit, might be pleaded to the suit on the judgment.

Whatever one's opinion may be of the policy of this enactment, and whether or not it may have exposed suitors to the risks and inconveniences pointed out in sec. 607 of *Story's* Conflict of Laws, [see *Manning* v. *Thomson*, 17 C. P. 606,] we should have been bound, while it remained in force, to treat the pleas now before us as unobjectionable.

It was repealed by the Ontario Act 37 Vic. ch. 7, passed on 10th February, 1876, after declaration in this action, but before pleas pleaded.

This replaced our law upon the same basis as the law of England, and destroyed the right to contest in our Courts the merits of the judgment now sought to be enforced, unless that right is preserved by the force of the Interpretation Act 31 Vic. ch. 1, O.

The defendant relies upon sub-sections 33, 34, and 35, of sec. 6, as having the effect for which he contends.

Neither sub-section 33 nor 35 touches the case. Sub-sec. 33 deals with the case of an Act being repealed wholly or in part, and other provisions substituted. There is no question here between an old law and a new one; for there is no new one. The clause is simply repealed, and 35 is occupied with matters foreign to the immediate subject of our inquiry.

But sub-sec. 34 demands careful consideration.

It declares that the repeal of an Act at any time shall not affect any act done, or any right or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause, before the time when

such repeal shall take effect; but the proceedings in such case shall be conformable, when necessary, to the repealing Act.

Before the passage of this repealing Act, the defendant had a right to meet this action by the defences he now seeks to set up. Was this an *existing right* within the meaning of the clause?

Proceedings in this action had been commenced; and the defendant might have pleaded all the pleas, without objection, at any time within three years before the repealing Act was passed. If the repeal prevents him now doing so, does it, within the meaning of the clause, *affect the proceedings* commenced before the repeal took effect?

After giving anxious consideration to these questions, I am unable to give any but affirmative answers to them.

There has been some discussion, in the argument before us, of the principles on which Statutes are construed so as to avoid giving them a retrospective effect unless that meaning is very plain; and cases in which these principles have been acted upon have been cited, such as *Paddon* v. *Bartlett*, 3 A. & E. 884, and *Wright* v. *Greenroyd*, 1 B. & S. 758. We have not to consider how far that doctrine applies in this case, because we are not asked to say what is the force of the repealing Act of 1876 by itself. We have to read with it, and in effect as part of it, the clause of the Interpretation Act in which the doctrine is embodied. Still the considerations pressed upon us are not without weight, because every reason advanced for giving the repealing Act an effect strictly prospective, may, though falling short of its immediate purpose, enforce the importance of giving the interpretation clause as liberal a construction in that direction as its terms will fairly warrant.

I shall pass by the repealing Act with one observation, namely, that it deals with a matter of principle and of right, and not merely of procedure. It is true the words used in the Act of 23 Vic. ch. 24, were that any defence set up, or that might have been set up, to the original

suit, *might be pleaded to the suit* on the judgment. This was not by way of prescribing the mode in which an already existing defence was to be set up. It was the institution of the new principle that the foreign judgment should no longer be conclusive. And the Act of 1873, in repealing the other, restored the conclusive character of the foreign judgment, and did not merely dispense with a formal plea as the mode of raising the defence, so as to admit the evidence under the general issue of "never indebted."

I make this observation because I notice that in discussing the sub-sections of the Interpretation Act, Mr. Justice Gwynne uses the expressions (at p. 423,) "they do not relate to a provision of law as to the nature or number of the pleas which might be pleaded in defence of an action, which is a provision relating to procedure only": a perfectly correct statement, but perhaps liable to be misunderstood, as the Act which in its terms prescribed the *nature* of the pleas permissible in actions on foreign judgments went far beyond mere procedure.

Returning to sub-section 34, the only discussion of its provisions which I find in the judgments now in review, is by Mr. Justice Gwynne. He says, at p. 424: "The word 'right' in that sub-section, by its context, 'or right of action existing, accruing, accrued, or established, or any proceedings commenced in a civil cause,' means, we think, 'a right to something capable of being enforced by action, and not the procedure by way of defence to an action.'"

With all deference to the learned Judge, I am unable to adopt this rendering of the Statute. I see no satisfactory reason for reading into the word "right" the meaning of the following words "right of action." I take the latter expression, viz., "right of action," to extend rather than limit the force of the word "right."

Our Legislature had for sixteen years proclaimed to the subjects and citizens of foreign States residing within our borders, as well as to our own people who traded in foreign countries, that a foreign judgment should not be enforced

by our Courts without an opportunity being afforded of contesting the merits of the claim; that they might save the expense and risk of litigating in the foreign Court, secure of their rights being always open for adjudication here; and that even if they resisted unsuccessfully before the foreign tribunal, they should be at liberty to renew the contest.

True, the pleadings we are now considering do not present the case of a resident of this country sued in the foreign Court. For anything that appears both parties may have been always resident in the State of New York until after the recovery of the judgment. But to my apprehension it would be hard to maintain that a resident of this country, who had forborne to urge his defence before the foreign Court in reliance on our law as it stood, had not acquired a right such as the clause in the Interpretation Act was intended to save.

I am aware that the view I suggest is equivalent to inserting in the repealing Act a clause saving from its operation all foreign judgments existing at the time of the repeal or obtained in cases in which the time for pleading had elapsed before the repeal: a clause whose scope would not be confined to cases of residents or of persons who forbore to defend the foreign suit. Should such a case arise, it will have to be considered. In the meantime we have to deal with a case in which not only was the foreign judgment recovered, but the action was commenced upon it while the Act was in force.

We must look at the position of both parties, because the plaintiff may be *affected* by the repeal of the Act as well as the defendant.

The expression is not *prejudicially* affected, though this may not make much difference, as one party cannot have his situation improved except to the prejudice of the other.

I have, while discussing the ninth plea, referred to the ground on which the right to enforce a foreign judgment in our Courts is maintained. Under the English law, and under our law as it now stands, the right is accorded to

the person who has recovered the judgment to enforce it by the machinery of our Courts, without having to establish again the claim for which the judgment was obtained.

While the repealed Statute was in force no such right was accorded. The right then enjoyed was clogged with the condition that every defence which could have been urged against the original claim must be surmounted in our Courts, if pleaded; and (as the Act was construed in *Manning* v. *Thomson*, 17 C. P. 606,) the claim must have been shown *prima facie* to be well founded.

This was the character and extent of the plaintiff's right when he sought the assistance of the Court in enforcing his judgment. The right he claims upon this demurrer is very different. How has the difference been effected? Only by the operation of the repealing Act. Where he benefits, if he can maintain his contention, the defendant suffers. The rights of both are *affected.* The defendant's position is capable of somewhat stronger statement, for he had had for three years the clear right to plead these pleas.

If there is any good ground for questioning the use I make of the word "right," I think the words "proceedings in a civil cause" help the defendant. The proceedings were "commenced before the repeal took effect," and what I have said applies to them. The plaintiff's proceedings are facilitated by removing the defences out of his way and enabling him to recover by way of assessment of damages in place of by a trial of issues of fact; and the proceedings of the defendant are correspondingly affected.

Let us suppose an action commenced upon a foreign judgment, and declaration served before the passing of the Statute 23 Vic. ch. 24; then the Act is passed and the defendant pleads the defences which that Act for the first time allowed; and we shall have a case not unlike that upon which the learned Judges before whom the case of *Paddon* v. *Bartlett*, 3 A. & E. 884, was argued in Error from the Court of King's Bench, pronounced their opinions.

That was an action of debt for rent reserved upon an indenture of lease. The writ was issued on 22nd July, 1833, and two days later the Royal assent was given to the Statute 3 & 4 Wm. IV. ch. 27, the 42nd section of which enacted that after the 31st of December in that year, no arrears of rent (*inter alia*) should be recovered by any distress, action or suit, but within six years after the same should have become due. The case went to trial in July, 1834, and the argument in Error took place in 1835. A question was raised like that lately before us in *Allan* v. *McTavish*, 2 App. Rep. 278, as to whether the limitation was not governed by 3 & 4 Wm. IV. ch. 42, sec. 3, which enacted that actions of debt upon an indenture of demise should be brought within ten years after the end of that session of Parliament, or twenty years after the cause of action. Tindal, C.J., said, at p. 895: "Admitting that the case depends on Statute 3 & 4 Wm. IV. ch. 27, sec. 42, and not on Statute 3 & 4 Wm. IV. ch. 42, sec. 3, still we think that the clause in question is prospective only, not retrospective, and therefore does not affect this action. The language of the clause itself shows this, for it enacts that after a future day, no arrears of rent shall be recovered by any action but within six years after the same shall have become due. The natural import of that is, that the Act shall have no operation till the day named, and *therefore shall not take effect by being pleaded in an action commenced before that day;* such, at least, would be the construction, unless there were other words to the contrary"; and he refers to the latter part of the clause as confirming his view. Lord Abinger, C.B., said, at p. 896: "When a Statute fixes the precise day at which its provisions shall take effect, I should not easily suppose that it pointed at anything to be done in the intermediate time. Courts in general will not construe Acts as retrospective unless the meaning is very plain. It is true, that if the words of a Statute are plain, they must be strictly followed; but if they are ambiguous, the whole context must be looked to for the explanation. If that were not done here, we

must come to a conclusion which would cut off rights of parties in actions commenced before the Statute came into operation."

This seems to fit the case of a Statute which comes into force immediately, and is at once attempted to be applied in a pending suit. We are dealing with a case the converse of that I have supposed, and we have the assistance of the interpretation clause which applies in terms the rule which the Judges arrived at in *Paddon* v. *Bartlett*, by a process of reasoning.

If we read the repealing Act as the plaintiff wishes it read, it assists him in his proceedings by cutting off the defendant from his defence. As to both parties, the proceedings in the action are affected, which the interpretation clause declares shall not be the effect of the repeal.

I am of opinion that the defendant is entitled to judgment on the demurrers to his second, fourth, fifth, and sixth pleas, and that as to them the appeal should be allowed.

As the appellant succeeds in part and fails in part, there should be no costs of the appeal to either party.

MOSS, C. J. A., and MORRISON, J. A., concurred. ARMOUR, J., concurred only as to the ninth plea.

JOHNSTON V. WESTERN ASSURANCE COMPANY.

Insurance—Pleading—Condition precedent—Jurisdiction of Local Legislature.

The declaration alleged that the policy sued on was subject to the conditions endorsed thereon, and averred a fulfillment of all the conditions necessary to entitle the plaintiff to maintain the action.

The defendants pleaded, that one of those conditions was that payment of the loss need not be made until sixty days after the same should have been ascertained and proved, and that at the commencement of the action the alleged loss had not been ascertained and proved.

The plea was demurred to.

Held, reversing the judgment of the Queen's Bench, that the plea was good, inasmuch as it clearly appeared from the declaration and plea coupled together that the condition was precedent, and that it was not necessary in the plea to point out how the loss was to be ascertained and proved, that being a matter of evidence.

Held, following *Parsons* v. *Queen Insurance Co.*, 4 App R. 103, that R. S. O. ch. 161, applied to the defendants, who were incorporated by the Parliament of Canada before Confederation, although their charter had since been amended by the Dominion Parliament.

THIS was an appeal from a judgment of the Court of Queen's Bench entering judgment for the plaintiff on a demurrer to the defendant's thirteenth plea. The pleadings sufficiently appear in the judgments below.

The case was argued on the 20th May, 1879 (*a*).

W. H. Lockhart Gordon, for the appellant. It was not within the power of the Provincial Legislature to interfere in any way with the appellants, inasmuch as they were incorporated by the Parliament of Canada before Confederation, and their charter has been since amended by the Dominion Parliament, 35 Vic. ch. 99 D. The condition mentioned in the thirteenth plea is clearly a condition precedent, and is properly pleaded as such.

T. H. Spencer, for the respondent. The first point argued by the appellant is already decided in our favour, in *Parsons* v. *The Queen Ins. Co.*, in which judgment was recently given by this Court. The plea cannot be sustained, as the condition is not pleaded as a condition

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J. A.

precedent, and it should have pointed out the method by which the loss is to be ascertained and proved. It may have been the intention of the parties that the loss should be ascertained and proved in an action. He cited *Scott* v. *Avery*, 5 H. L. 811. 827; *Horton* v. *Sayer*, 4 H. & N. 643; *Dawson* v. *Fitzgerald*, L. R. 1 Ex. D. 257, 269; *Roper* v. *London*, 1 E. & E. 825.

May 27, 1879 (*a*). MOSS, C. J. A.—To an action upon a policy of insurance against fire the defendants pleaded several pleas, setting up various conditions and alleging breaches. The plaintiff replied that the policy was made in this Province after the 1st of July, 1876, and that the conditions, which are different from those contained in the Statute for securing uniform conditions, have not been added in conspicuous type, or in ink of a different colour, or in the manner required by the Statute. To this the defendants demurred, upon the grounds that the Statute does not apply to the defendants' company, and that it is *ultra vires* of the Provincial Legislature, and that the conditions are substantially in accordance with those prescribed by the Statute. The points raised upon this demurrer have already been disposed of in this Court with one exception. It is pointed out that the Parliament of the Dominion, in 1872, passed an Act relating to this Company, and it is therefore contended that they are wholly withdrawn from the operation of Provincial legislation. The Act referred to is 35 Vic. ch. 99, D., the main object of which was to facilitate their transaction of the business of life assurance, and to authorize investments in foreign securities. We think that it follows from the principles which were stated in *Parsons* v. *The Queen Insurance Co.*, 4 App. R. 103, and which are binding upon this Court, until reversed by some higher tribunal, that this does not entitle the defendants to claim immunity from the provisions of the Provincial Statute. The

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

Dominion Act merely amplified or modified their corporate powers. It did not assume to remove, if it could have removed, the company from the scope of Provincial legislation prescribing conditions incidental to their contracting within the Province. Upon this head we need do no more than direct attention to the views we have already expressed.

But the plaintiffs also excepted to the defendants' thirteenth plea, and the Court of Queen's Bench have decided against its sufficiency. The question does not appear to be of much practical importance, or indeed to touch any larger right than that to some incidental costs, but the parties are entitled to the benefit of our opinion.

The declaration alleges that by the policy it was declared that, subject to the conditions endorsed thereon, the defendants should pay and make good the damages sustained by the insured, and that all conditions were fulfilled necessary to entitle the plaintiff to maintain the action The plea in question avers that the policy was subject to certain conditions endorsed thereon, one of which was that payment of losses need not be made by the defendants until sixty days after the loss shall have been ascertained and proved, and that at the time of the commencement of the action the alleged loss had not been ascertained and proved. It was held that the condition, if available as a condition precedent, is not so pleaded, and that it does not point out how the loss is to be ascertained and proved, and that the defendants must shew some clear method of proof agreed upon by the contract which must be resorted to before a cause of action vests in the plaintiff. We are unable to concur in these views. With great respect for the opinion of the Court of Queen's Bench, it appears to us that when the declaration and plea are coupled together, the condition appears to be plainly precedent, and to be so stated in the pleading. By the declaration the policy is described as a contract to pay, subject to the endorsed conditions. By the plea it is set up that the ascertainment and proof of the loss is one of such conditions. It is urged

that for all that appears the intent may have been that the loss should have been ascertained and proved in an action. This contention appears to be wholly untenable. It would simply make the condition futile for any purpose.

It cannot be doubted that its object was to give the company the opportunity of satisfying themselves of the validity of the claim, before they were exposed to an action. But according to the plaintiffs' contention an action might be brought the moment after the loss occurred. It does not appear to us that there is any real difficulty in giving the condition an interpretation which is in accordance with common sense and general usage in the transaction of business affairs. It is the duty of the insured to give reasonable proof of the fact and amount of the loss. All that he is required to do is to furnish such statements and evidence as, in the event of objection by the defendants, shall be deemed sufficient to satisfy reasonable persons desiring to act honestly and fairly. There is no danger of any tribunal applying harsh criticisms to his mode of presenting proof, or permitting the alleged vagueness and uncertainty of the condition to operate to his prejudice.

We think that the defendants are entitled to judgment upon the exceptions.

BURTON, J. A.—The defendants' covenant was, that subject to the conditions endorsed upon the policy sued on, they would pay to the assured all such immediate loss or damage not exceeding $2000, as should happen by fire during the currency of the policy, and averred generally performance of those conditions.

By the 13th plea, which is demurred to, the defendants say that one of those conditions was, that payment of such loss need not be made by the defendants until sixty days after the same should have been ascertained and proved, and then they allege that at the time of the commencement of the action the alleged loss had not been ascertained and proved.

Judgment has been given against the sufficiency of the

plea, and although we have a very meagre note of the judgment, it seems to have proceeded on the grounds:

1st. That if available as a condition precedent, "it is not pleaded as such."

2nd. That it does not point out how the loss is to be ascertained and proved.

I am free to admit that I do not understand the first of these grounds. When a contract is set out in pleading as being subject to certain conditions, the meaning is, that the conditions are incorporated with it, and the defendants agree to be liable only according to the tenor of those conditions, and when therefore the plea alleges that one of those conditions was, that the defendant was not bound to pay until certain things were done, I should have supposed that even when pleading was regarded as a science much more than at the present day, it must have been construed as alleging that the ascertainment and proof of the loss was a condition precedent to the rights of the plaintiff to maintain his action, that it was alleged in the very terms of the contract itself, and that the vagueness or absence of any clear mode or proof arose from the contract itself, and not from the mode of pleading it. If the contract had required that the proof should be made in a particular way, and accompanied by certificates of the nearest clergyman or magistrate, however unreasonable and absurd such a requirement might have been, we must have held that if set up, the plaintiff would not have been entitled to maintain any action until it was complied with.

The contract here sets up no such unreasonable conditions, but it does allege *as a condition* that the defendants were not to pay until the loss was ascertained and proved. If, as probably we must assume upon these pleadings, " no clear method of proof was agreed on by this contract of assurance," why should these defendants be called upon, contrary to every principle of pleading that I am aware of, to plead evidence.

We have nothing to do at present with the question of how this issue is to be proved; but I can conceive no

difficulty in a jury deailng with such an issue. The plaintiff submits such proofs as he is advised to make, stating the nature and amount of his claim, and the proofs he relies on to substantiate it. If not satisfactory to the company, they would in reason and fairness point out in what respect it was deficient, and require the plaintiff to supply the deficiency, which, in order to place himself in a position to sue, he would feel bound to do. If, on the other hand, the company, though requested to point out any objections, failed to do so, I do not think a jury would have much hesitation in finding the issue raised on the 13th plea in favour of the plaintiffs. The plaintiffs, at all events, would assume the risk of establishing that sixty days before the issue of the writ his claim had been ascertained and proved in the terms of the plea, whatever it may mean. The terms are not "proved and adjusted" as we find in some policies, but ascertained, which probably means ascertained by the insured, and then proved for the satisfaction of the insurer. The condition can only mean that it shall be reasonably proved in such a manner that, in the event of disagreement, a jury shall find to be reasonable.

The plaintiff might, as in *Braunstein* v. *The Occidental Death Ins. Co.*, 1 B. & S. 782, have replied that he had duly and in accordance with the conditions of the policy, ascertained the loss, and proved with all due, proper, reasonable, and sufficient evidence and information to establish the claim, but that the directors had unreasonably and capriciously refused to be satisfied therewith. If that replication had been demurred to, it must have been held to be a good answer to the plea, and a similar question would have to be decided by a jury on issue being taken on the plea, viz., whether the proof of the loss was of such a character as ought reasonably to have satisfied the company if answered in the affirmative, and that it was so furnished sixty days before action brought, the issue would be determined in favour of the plaintiff. If, on the contrary, the plaintiff had not furnished proofs with which the directors as reasonable men ought to have been satisfied, he must have failed.

I think the plea good, and that this appeal should be allowed.

PATTERSON J. A.—I agree that the defendants are entitled to succeed upon the objections to their 13th plea, although, as they fail upon the replication, this success may not be of much value.

The contract set out by the declaration is, that, subject to conditions endorsed upon the policy, the defendants were to pay and make good to the assured such loss or damage by fire as might happen to the insured premises. It is alleged that loss happened, and the plaintiff claims payment for it. And the plaintiff avers that all conditions have been fulfilled, and all things have happened and all times have elapsed necessary to entitle him to maintain this action.

The plea traverses this general statement of performance by shewing that one of the conditions mentio ed in the declaration was, that, before the plaintiff could demand payment, the loss should be ascertained and proved, and sixty days after such ascertainment and proof should have elapsed; and it avers that that condition was not fulfilled, and that that time had not elapsed.

No rule of pleading has been brought to our notice which requires us to hold such a pleading bad, or even to discuss the character of the condition in question.

Had the facts which are before us upon the declaration and plea appeared on the declaration alone, as in former times they would have done, the plaintiff thus shewing that he claimed payment in the face of one of the terms of his contract which was, that he was not entitled to be paid until the occurrence of an event which had not happened, it would, as it strikes me, be beyond argument that the declaration would be unsustainable. He could not sustain his allegation of performance by arguing that the condition was too vague to be performed.

I do not know that the case is altered, because under our present system of pleading a general allegation of per-

formance of all preliminary conditions is contained in the declaration, leaving the specific breach to appear by plea.

Although we are not at liberty to notice it on this demurrer as a fact, we may, nevertheless, for argument's sake, assume it to be possible, that the policy contained the usual provisions for proof of loss. For anything that appears, some such provision may be pointed to by the condition requiring the loss to be ascertained and proved. But whether that be so or not, I am unable to perceive any good reason for refusing to leave the fact of ascertainment and proof to be tried upon an issue of fact. We are not obliged to read the word "ascertained" as equivalent to "adjusted between the parties;" and the word "proved," which as here used, indicates that the proof is to follow the ascertainment, rather tends to shew that that is not the force intended to be given to the word. The condition would thus seem to be satisfied by the assured first procuring information of the extent of his loss, and then furnishing reasonable proof of it to the company, in order that the latter might have a basis for investigation, or the means of knowing the amount to be provided for during the sixty days delay.

But even if a stronger expression had been used, such, *e.g.*, as "proved and adjusted," which was the phrase employed in the cognate condition discussed in *Waydell* v. *Provincial Insurance Company*, 21 U. C. R. 612, it would still be true that the fact of proof and adjustment would be a matter of evidence, as was pointed out in that case by McLean, J., and Hagarty, J., particularly by the latter, (p. 622).

There is room for a further objection to the plaintiff's right to maintain the action upon the facts which appear, if we are to look very closely at the pleadings. It is of the same character as that noticed by Sir John Robinson, in his judgment in *Lambkin* v. *Western Insurance Company*, 13 U. C. R. 237, in which this same condition was in question. Whatever may be said as to the nature of the proofs to be given, and therefore as to the time from which

the sixty days should count, one thing which is clear is that the action cannot be brought till at least sixty days after the fire. We can see that that limitation at all events applies, and the plaintiff has not shown that sixty days elapsed between the fire and the commencement of the action.

I only allude to this point without discussing it, because the plea must be held sufficient for the other reasons given.

MORRISON, J. A., concurred.

Appeal allowed as to exceptions to 13th plea, and dismissed as to demurrer to replication; no costs of appeal.

MCQUEEN V. THE PHŒNIX MUTUAL INSURANCE CO.

Mutual insurance—Assignment of property insured—R. S. O. ch. 161, *sec.* 41.

The defendants' agent issued a thirty-day interim receipt to the plaintiff, and he assigned to one M, in trust for his creditors, the insured property which was destroyed by fire after the expiration of the thirty days. It appeared that the agent was expressly notified of the assignment, to which he assented, stating that no notice to the company was necessary. No application was made under section 41 of R. S. O. ch. 161, to ratify the insurance to the alienees, and the policy issued, in the terms of the application, to the plaintiff.

Held, reversing the judgment of the Common Pleas, that the plaintiff was not entitled to recover, as the notice of assignment, even if given to the company, would only have been notice that the property had been alienated, which, under the above section, rendered the insurance void.

THIS was an appeal from the judgment of the Common Pleas, making absolute a rule *nisi* to set aside a verdict for the defendants, and to enter a verdict for the plaintiffs, reported 29 C. P. 511. The pleadings and facts are stated there, and in the judgment on this appeal.

The case was argued on May 17, 1879 (*a*).

Bethune, Q.C. (with him *W. A. Foster*), for the appellants. The conversation which took place between McKenzie and the agent did not amount to a notice of the alienation, but even if it were sufficient, the agent was *functus officio* so far as his power to receive notice was concerned, as soon as he had transmitted the application to the company. It is clear that, according to the rule laid down in *Billington* v. *The Provincial Ins. Co.*, 2 App. R. 158, the company never had notice of this alienation. The assignment was clearly an alienation within the meaning of s. 41 of R. S. O., c. 181, and under that section the policy was thereby avoided, and it could only be ratified by the assent of the company; so that even if the agent was authorized to receive the notice, he had no power to assent to the alienation, or to a waiver of the conditions of the insurance. They cited *Mason* v. *Hartford Ins. Co.*, 37 U. C. R. 437; *Hawke* v. *Niagara District Mutual Ins. Co.*, 23 Gr. 148; *Hendrickson* v. *Queen Ins. Co.*, 31 U. C. R. 549; *McCrae* v. *Waterloo Ins. Co.*, 1 App. R. 218; *Shannon* v. *Gore Ins. Co.*, 2 App. R. 396; *Divernois* v. *Leavitt*, 23 Barb. 63.

Robinson, Q. C., for the respondent. The condition relied upon by the appellants was sufficiently complied with by the notice given to the agent, who had authority to receive it until the policy issued, as until that time he is the person with whom the contract is made. The written consent of the company, if necessary, was dispensed with, and the appellants are estopped from relying on its non-performance as it must be held, under the circumstances, to have been waived. Moreover its performance was really prevented by the plaintiffs, as the policy was not issued till after the fire. It was not proved that the condition in question was endorsed upon the printed form of policy in use by the company at the date of the receipt. The terms of the receipt by which the insurance is made subject to

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

conditions which the insured has never seen, and which the agent himself is often ignorant of, are unreasonable. The case of *Ballagh* v. *The Royal Mutual Fire Ins. Co.*, 44 U. C. R. 70, shews that reasonableness of condition is to be determined by its application to special circumstances. The assignment of property referred to in section 41 should be held to mean an alienation after the issue of the policy.

May 27, 1879 (*a*). BURTON, J. A., delivered the judgment of the Court.

The case would appear to have been argued in the Court below as if the plaintiff were suing on the interim receipt, overlooking the fact that that document was to be in force only for thirty days from the 19th November, 1877, and that the loss did not occur until the 15th January, 1878.

No amendment, therefore, would assist the plaintiff. Even if the loss had occurred during the thirty days, the plaintiff could not have recovered on the facts disclosed at the trial.

The assignment of the property assured was made on the 28th November. Whether the agent who had granted the receipt had notice of it, and assented to it, appears to be wholly beside the question.

The defendants are a mutual insurance company, and the insurance, whether effected by an interim policy, which the agent was empowered to issue, or by the more formal document which he would receive on the risk being approved of by the directors, was subject to the conditions which the statute itself imposes on all insurances, under s. 41.

That section declares that in case any property is alienated by sale, insolvency, or otherwise, the policy shall be void, and shall be surrendered to the directors to be cancelled; but it provides that the assignee may have the policy transferred to him, and, upon application to the directors, such assignee, on giving proper security to the satisfaction of the directors, may on application to them within thirty days

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

from the alienation, have the policy ratified and confirmed to him. As regards the original assured, the policy becomes null. The assignee may, if the directors think proper, have it revived in his favor.

It was not a question of whether the company's agent had notice. The notice, whether given to him or to the directors, would be only notice that the property had been alienated, which circumstance alone, with or without notice, rendered the insurance null.

No application was ever made to the directors to ratify that assurance to the alienees, nor were any steps taken by them to obtain a ratification of the policy in their favour, but the policy issued in the terms of the application to the plaintiff.

His claim under it is also answered by the fact that at the time of the issue of the policy the statements in the application had ceased to be true, and that he was not interested in the goods at the time of the loss, either of which would furnish a complete answer to this suit.

Without entering into the other questions discussed below, this would seem to be sufficient to dispose of the plaintiff's claim.

The judgment of the Court below should, I think, be reversed, and this appeal allowed, with costs.

Appeal allowed.

FREY V. WELLINGTON MUTUAL INSURANCE COMPANY.

Fire Insurance—Payment of losses under 36 *Vic. ch.* 44, *sec.* 52, *O.—Notice of assessment—Mutual Insurance Co.—Statutory conditions.*

Under the terms of a mutual insurance policy the losses were only to be paid within three months after due notice given by the insured according to the provisions of 36 Vic. ch. 44, sec. 52, O., which enacts that in case of loss by fire, notice thereof shall be given to the secretary of the company forthwith, and the proofs, &c., called for by the policy must be furnished to the company within thirty days after said loss, "and upon receipt of notice and proofs of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after the receipt by the company of such proofs."

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 102, that a defence under this section was not open upon the pleadings, which are set out below; and an amendment was, under the circumstances, refused.

Semble, without deciding whether the above statute—the Mutual Insurance Companies' Act—was superseded by 39 Vic. ch. 24, O., that even if this defence were available, it would not entitle the defendants to succeed, as the above section does not prevent an action being brought before the expiration of three months where the directors have refused, as they did in this case, to pay the claim.

The defendants had refused to accept a new trial on the plea of arson, which the Court below offered them upon their consenting to abandon all other defences, and the Court of Appeal declined to interfere by granting it.

A notice of assessment mailed on the 12th February, requested payment to be made on the 24th of the same month.

Held, that on this and other grounds stated below, the assessment was invalid, as under secs. 43 and 45, the day named in the notice for payment must be at least thirty days subsequent to the mailing.

THIS was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the defendants and to enter a verdict for the plaintiff, reported 43 U. C. R. 102. The facts are fully stated there, and in the judgment on this appeal.

The case was argued on the 1st March, 1879 (*a*.)

C. Robinson, Q. C., for the appellant. It has been already decided by this Court in *Parsons* v. *Citizens Insurance Co.*, 4 App. R. 96, that an Insurance Company cannot set up against the insured the statutory conditions contained in R. S. O., ch. 162, unless they are printed on the policy; but this is a mutual company, and it is submitted that in

(*a*) *Present.*—MOSS, C. J. A., BURTON and PATTERSON, J. J. A., and BLAKE, V. C.

this case the Court below were wrong in holding that the Mutual Fire Insurance Company's Act was superseded by R. S. O., ch. 162. These companies are incorporated under a special statute, and the rule is clear that a general Act does not repeal a special Act unless specially referred to. But even if the company cannot avail themselves of their defence under the statutory conditions, they are entitled to succeed on the fifth and sixth pleas, by which it was intended to set up the defence that the action was brought before the expiration of the three months named in section 52 of 36 Vic. ch. 44, O. If the pleas do not sufficiently raise that defence, an amendment should be allowed. The verdict for the defendant on the 7th plea, alleging non-payment of the assessment, should not have been disturbed, as the assessment was valid, the six per cent. being assessed on the ground that the policy in question was a renewal policy, through which and the original policy the insurance was in force for a year. If the assessment is good as against those whose policies extended over a year, it is equally good in those cases in which the insurance covers a year, although the particular policy may not. Sufficient notice of the assessment was given to the plaintiff. The local agent shews that the plaintiff not only received the notice, but promised to pay the amount. The evidence clearly supports the charge of arson, and the verdict on that plea should be set aside and a new trial granted.

W. H. Bowlby, for the respondents. The appellants cannot rely on sec. 52 of 36 Vic. c. 44, O., as the pleas do not raise this defence, and great injustice would be done to the plaintiff by permitting the amendment asked, since, if it were made, we would be out of Court, as under the 54th section an action must be brought within a year. But even if a plea had been framed under section 52, it would not have been any defence, for that section enacts that the loss shall be payable three months after the receipt by the company of such proofs as are called for by and under the policy, and this policy (being without conditions) does not call for

any proofs because it is not framed in accordance with "The Fire Insurance Policy Act, 1876," 39 Vic. ch. 24, O., which supersedes 36 Vic. ch. 44, O., and therefore the section has no effect. Then the conditions pleaded in the 5th and 6th pleas, are inconsistent with the provision in the body of the policy, which says that the loss shall be paid within three months after due notice is given by the insured according to the provisions of the Act, which provisions are mentioned in sec. 52 of 36 Vic. ch. 44, and are to the effect that notice shall be given forthwith after the loss. Under that section the payment is to be made three months after the notice of loss, not after the claim, and it appears from the evidence that such notice was given on the 22nd of May, more than three months before the action was commenced. Moreover, the company waived their right, if any, to the three months, by refusing to pay the amount after they were in possession of the claim papers. No valid assessment was proved. It is not shewn that the policy sued on was a renewal in the sense contended for by the appellant. From all that appears it may have been for a different amount. But the notice was otherwise defective under section 45, in not stating the period over which the assessment extended; and under section 43, in making it payable in less than thirty days. A new trial should not be granted on the plea of arson. The Court below offered the appellants a new trial on that plea if they would abandon all their other defences, which they refused.

27th May, 1879. MOSS, C. J. A., delivered the judgment of the Court.

We do not think that we can, in accordance with the established rules by which Courts of Appeal are guided, accede to the contention that a new trial ought to be granted on the plea of arson. The Court of Queen's Bench gave the defendants an opportunity of submitting this question to another jury, if they were willing to abandon their other defences. This offer they did not care to accept, and we, therefore, do not feel called

upon to interfere. Whether we should have thought proper to annex this condition, if it had been our duty to pronounce upon the question in the first instance, it is unnecessary to enquire. The other pleas set up grounds which, although some of them are not unfair to raise, do not go very directly to the merits, and we are by no means prepared to say that the term which the Court attached was unreasonable, even if such an opinion would have warranted our interference. It is conceded that the other grounds of appeal, with the exception of those taken upon the sixth and seventh pleas, have been rendered untenable in this Court by our decisions in other cases. These two remaining grounds we proceed to consider.

From the abbreviated statement in the printed case it appears that the sixth plea alleged that the defendants were a Mutual Insurance Company, incorporated under the laws of the Province relating to such companies, and that the policy was issued to the plaintiff as a member of the defendants' company, and contained a number of conditions, which were set out in words in the original pleading, "including among them"—I am now quoting the words of the printed case—"the condition as to the three months for payment after proof of loss; and it concluded with an averment that the action was brought before the expiry of the said period of three months."

As we understand it, the condition thus referred to is stated in the fifth plea to be that the loss should not be payable until three months after the receipt by the defendants of the proofs of such loss to be furnished by the plaintiff to the defendants. Upon the policy there is endorsed a condition on the subject of proofs, which is not in accordance with "The Fire Insurance Policy Act, 1876." However, it only required notice of loss to be given forthwith to the secretary, and a particular account with certain declarations and certificates to be delivered within thirty days, and provided that until such proofs, declarations or certificates were produced, the loss should not be payable. Even if this condition were available to the defendants

notwithstanding the Act, it would not support the plea, for it does not profess to stop the right to sue for three months, or for any stated period, after proof has been made.

But the objection which the defendants really wish to make is, that the action was prematurely brought, because in the body of the policy there is a stipulation that payment is to be made within three months after due notice is given by the insured according to the provisions of the Act of 1873 relating to mutual fire insurance companies. The 52nd section of that Act, (R. S.O. ch. 161, sec. 56,) provides that in case of loss or damage the member shall give notice to the secretary forthwith, and the proofs, declarations, evidences, and examinations, called for by or under the policy, must be furnished to the company within thirty days after said loss, and upon receipt of notice and proofs of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after the receipt by the company of such proofs. The state of facts to which it is sought to apply this defence is that the fire occurred on the 21st of May; on the next morning the plaintiff advised the defendants by telegraph, and their secretary visited the scene of the fire that same afternoon, when he was informed by the plaintiff of the particulars; on the 23rd the plaintiff received a letter from the secretary appointing a valuator of the goods that had escaped damage, and the plaintiff having immediately appointed a person on his behalf a valuation was made, the son of the defendants' secretary acting as clerk, and their local agent being present. According to the plaintiff's statement, this was the result of an arrangement with the secretary. He swears: "I asked the secretary if he would pay after ninety days. He said in a case like this they generally paid in eight or ten days. He said he must send a valuator, and I should get one, and they would value the loss. He then left." On the 29th June the secretary wrote to the plaintiff's attorneys that if he had any claim he had better send in the papers, so that they might be submitted

to the board. This suggestion was adopted, and on the 13th July the secretary wrote stating that after an examination of the papers at the board meeting it was resolved that the claim should not be paid. If the telegraphic despatch of the 22nd of May could be deemed a notice three months after notice had elapsed before the commencement of the suit.

It is objected, and from the statement the objection appears to be well taken, that this defence is not open upon the plea. The defendants ask leave to amend, but we do not think that it would be a just or reasonable exercise of our discretion to accede to this application. By allowing them thus to improve their position, we should be giving them a better chance to defeat the plaintiff's claim upon an objection which in the circumstances of the case is far from meritorious. If the effect of amending the plea were to enable the defendants successfully to contend that this action was brought too soon, the plaintiff's right would be finally barred, for the year limited by the Act for bringing proceedings has long since passed. But it does not appear to us that an amendment would necessarily entitle the plaintiff to succeed.

Assuming that the Court of Queen's Bench was in error in holding that the Mutual Companies' Act is superseded by the Act of 1876,—upon which we do not desire unnecessarily and without full argument to pronounce an opinion,—and assuming therefore that the 52nd section of the former Act is applicable, it does not follow that this action is premature. That section does not say that no action shall be brought until the expiration of three months after receipt of proofs. It is wholly silent as to legal proceedings. It directs the board, upon proofs being furnished, to ascertain and determine the amount of loss, and expressly declares that *such* amount shall be payable in three months after receipt of proofs. What is meant by such amount? Clearly the amount settled by the directors. That is the natural import of the language used. No other amount is mentioned

in the preceding part of the clause. No reference is made to the amount of loss claimed, or actually sustained, but the manifest object is to afford that period for payment without suit, where the directors choose to come to a determination. This construction is fortified by a consideration of the 55th and 56th sections, which deal with the cases of recovery for more or less than the amount previously determined upon by the directors. But if they refuse to name any amount, and communicate to the insured their intention to resist his claim *in toto*, what then? To what passage or expression in the Act can the defendants point as staying the plaintiff for three months? It seems to satisfy the language of the enactment, to be in harmony with its general scheme and policy, and to afford the defendants full protection, if their right to withhold payment is in such a case limited to the three months which, under the 57th section, must elapse between the recovery of judgment and the issue of execution. Other objections to the plea were urged, which it would serve no useful purpose to discuss, as for the reasons given we think this branch of the defence fails.

The 7th plea set up the failure of the plaintiff to pay an assessment upon his premium note. There are several fatal objections to this defence. The statute provides (sec. 43) that an assessment shall become payable in thirty days after notice of such assessment shall be mailed to the person who has given the premium note directed to his post office address, as given in his original application, or in writing to the secretary of the company. On the 12th of February the notice on which the defendants rely was mailed, but it required payment to be made on the 24th of the same month. The 45th section requires the time for payment to be stated in the notice, and so impliedly requires the named day to be at least thirty days subsequent to the mailing. This assessment, therefore, does not seem to have been validly made upon the plaintiff.

Again, the notice required him to pay the sum of $18, being 6 per cent upon his premium notes 8879, 10262,

these numbers corresponding to the policies he then held. Policy 8879 was on a different property. Policy 10262 is that now in question. It is said to be a continuation or renewal of another policy numbered 8104, and although it is argued on behalf of the plaintiff that this is not proved, we take it to be the fair result of the evidence. The effect of this is, that he was insured under policy No. 8104, until the commencement of the term covered by the present policy. By the resolution of the directors levying different rates of assessment upon policies which were effected or which had expired at certain dates. three per cent. or $6 was chargeable in respect of the present policy. By another part of the same resolution, a rate of 3 per cent. was assessed against policies in a position similar to No. 8104. In fact, therefore, the plaintiff would seem to have been liable for $12 upon the footing of these two policies, but the notice did not charge him in that manner. It contained no reference to 8104, but demanded payment in respect only of the present policy, and that upon different property. Indeed it did not even shew that payment was demanded of the sum of $12 on account of this policy, for it names a lump sum $18 upon the two policies it mentions. It is quite true that it is extremely improbable that the plaintiff was misled or suffered the slightest prejudice from this inaccuracy of statement, but the authorities to which we have been referred abundantly prove that the company must be strictly correct and regular in its proceedings before it can insist upon a forfeiture of a man's policy upon this ground. That is not the position of these defendants, and we must hold that this objection to the plaintiff's recovery has also failed, and dismiss the appeal, with costs.

Appeal dismissed.

YEOMANS V. THE CORPORATION OF THE COUNTY OF WELLINGTON.

Property abutting on highway—Raising highway—"Injuriously affected"—Compensation—36 Vic. ch. 48, sec. 373, O.—R. S. O. ch. 174, sec. 456.

Held, affirming the judgment of GWYNNE, J., 43 U. C. R. 522, that where a municipality raises the highway in such a manner as to cut off ingress and egress to and from property abutting thereon, the owners of such property are entitled to compensation under 36 Vic. ch. 48, sec. 373, O., for the injury caused thereby.

The cases upon the subject reviewed.

THIS was an appeal from the judgment of Gwynne, J., discharging a rule *nisi* to set aside an award, reported 43 U. C. R. 522. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 5th March, 1879 (*a*).

C. Robinson, Q. C., for the appellant.

A. J. Cattanach, for the respondent.

The arguments and cases cited sufficiently appear in the judgment.

May 27th, 1879. MOSS, C. J. A.—The question in this case arises upon the construction of the 373rd section of the Municipal Act of 1873, (R. S. O. ch. 174), which provides that "every council shall make to the owners or occupiers of, or other persons interested in real property entered upon, taken, or used by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages * * necessarily resulting from the exercise of such powers beyond any advantage which which the claimant may derive from the contemplated work." The appellants in the exercise of their general jurisdiction over roads, and without passing any by-law, had raised the original allowance for road about four feet in front of premises owned by the respondent, upon which many years since a grist mill had been erected. This building stood upon a small island in the

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, J J. A.

river Maitland, within a few feet of the original allowance, and when it was put up the neighbourhood was comparatively unsettled.

As the country improved better bridges were built by the corporation across the branches of the river, and it became necessary in the public interest to raise the road so as to make it level with the bridges, to widen the roadway, and protect the sides by railings. The consequence was, to a great extent to cut off the premises from the access to the road which had previously been enjoyed. Compensation having been awarded to the respondent under the statute, a rule *nisi* was obtained, and afterwards discharged by Mr. Justice Gwynne sitting for the Court.

The first impression produced upon reading the statute is, that the injury which the plaintiff has sustained is explicitly embraced in its terms, One would scarcely expect to hear it denied that the respondent's land had been prejudicially affected by this work, which confessedly was done by the corporation in the exercise of powers which it possessed or assumed. But the question does not admit of the speedy solution which the mere perusal of the legislative language would suggest. The general subject with which it deals, and the particular terms used, have alike undergone judicial exposition under a great variety of circumstances. At present we are chiefly concerned with the force which has been given to the term "injuriously affected." The necessity of placing some restriction upon its significance was perceived by the Courts in England soon after its introduction into statutes, and by a long series of decisions a rule sufficiently precise for practical purposes has been formulated. That rule is, I apprehend, firmly established in the law of this country, where a railway company in the exercise of its powers, has damaged land; nor is it easy to perceive how any tangible distinction can be drawn between the clause in our statute, and the provision in the Lands Clauses Consolidation Act, 1845, 8 Vic. ch. 18, with which the Courts of the mother country had to deal.

That provision, which is contained in the 68th section, enacts, that "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works," &c, Between that and the section in our Act there are verbal differences, but a substantial identity. Now, as it is upon the application of this rule to the special circumstances of this case that the appellant mainly relies, it will be convenient to refer to some of the leading cases in which it is expounded.

It was laid down with great distinctness by Lord Cranworth in a passage that has been frequently quoted, *Caledonian R. W. Co.* v. *Ogilvy*, 2 Mac. 229, 235: "The construction that is put upon this expression 'injuriously affected' in the clauses in the Act of Parliament, which gives compensation for injuriously affecting lands, certainly does not entitle the owner of lands, which he alleges to be injuriously affected, to any compensation in respect of any act, which, if done by the railway company without the authority of Parliament, would not have entitled him to bring an action against them:"

This doctrine has been more fully explained in subsequent cases, to which I shall presently refer, but with a view to a more thorough appreciation of their bearing upon this case, I pause to note briefly the argument which the appellants have founded upon its terms. It is, that they, being invested with jurisdiction over this road, and being bound to keep it in repair, have the same right to raise or lower its level, as the private proprietor of land adjoining the respondent's would have, without being liable to an action; and as no action could be maintained against such a proprietor simply because in the reasonable use of his property he chose to build a high wall or raise a high embankment upon his own soil, so no action could have lain against the corporation here, and therefore by the direct terms of the rule compensation cannot be obtained.

I shall afterwards examine this reasoning, but I now proceed with some further reference to the circumstances and language of cases which explain and act upon this rule.

In *Re Penny*, 7 E. & B. 660, an attempt was made to get compensation for injury arising from the overlooking of premises by persons on the railway platform, whereby the value of the rentals had been deteriorated. In delivering his opinion, Wightman, J., said, at p. 669: "Is that a legitimate item for compensation? The line must be drawn somewhere. It is difficult to say that the most remote acts on the part of the company might not in some sense injuriously affect the property of land owners in the neighbourhood. But I think the true criterion was adopted in *Caledonian R. W.Co.* v. *Ogilvy*. Applying that criterion to the present case it is clear that no action would have lain for such an injury before the existence of the statutory powers of the company, and that therefore it affords no ground for compensation now." Similar language was used by the other Judges who took part in the judgment.

In *Hall* v. *The Mayor of Bristol*, L. R. 2 C. P. 322, the question arose upon the right to claim compensation for injuries, occasioned by a sewer constructed by a local board of health, to houses which had been built within twenty years on old foundations in the place of buildings of much lighter construction. The statute there invoked provided that full compensation should be made to all persons sustaining any damage by reason of the exercise of any of the powers it gave. Montague Smith, J., expressed the opinion that the Court must look to the nature of the body in which the powers are vested, and to the construction given to similar Acts, and that it would be difficult to give a larger construction to the words of the Act, which had been passed for public purposes, than the House of Lords had decided to be the true principle of construction of the Lands Clauses Consolidation Act, namely, "to confine the meaning of the words to such injuries as would have given a right to compensation independently of that Statute." He then indicates the policy which has led to this construction in the following sentence: "A wider construction, too, would lead to great difficulty, because there are a variety of things which are not actionable, but which do

yet cause damage to a man's property, such as the erection of something causing a loss of prospect, or the erection of a public convenience, though at such a distance as would prevent its being an actionable nuisance. It would be very difficult to provide for or set a limit to such claims, if they were recognized."

In *Eagle* v. *Charing Cross R. W. Co.*, L. R. 2 C. P. 638, the cases are reviewed by Bovill, C. J., with special reference to the contention that it does not follow that the party is entitled to compensation because the injury is one in respect of which there would have been a remedy by action. That contention was based upon some expressions of Erle, C. J., in delivering the judgment of the Exchequer Chamber in *Ricket* v. *Metropolitan R. W. Co.*, 5 B. & S. 156. In Eagle's case the injury was a diminution of light to the plaintiff's premises by the construction of the defendants' works, and the language of Erle, C. J., on which reliance was placed, was that the Statute limited "the liability to compensation in respect of injuries to definite rights of a permanent nature, that is, to rights in land." It was argued that the diminution of the light was an injury to the plaintiff's trade, not to his premises; but the argument wholly failed. The Chief Justice quoted from the judgment of Lord Cranworth in the House of Lords in Ricket's case a passage, which is not without its application to the case we are now considering. His Lordship said (p. 198): "Both principle and authority seem to me to shew that no case comes within the province of the statute, unless where some damage has been occasioned to the land itself in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as, by loosening the foundations of buildings upon it, obstructing its light or its drains, *making it inaccessible by lowering or raising* the ground immediately in front of it, or by some such physical deterioration."

It was also explained that Erle, C. J., only meant to say that good will of a business is not an interest in land, or the

subject of compensation. It is worth observing that in *Ricket* v. *Metropolitan R. W. Co.*, L. R. 2 H. L. 203, Lord Westbury took a larger and more liberal view of the words we are now considering. Although his view has not met with acceptance, I venture to think there is much force in the reasoning he used in its support. In his opinion it was a mistake to lay down that the injury intended by the words "injuriously affected" must be one in respect of which, if there had been no statute enabling the company to do the act, an action would have lain for the injury at common law. "Right to compensation," he said, "is a title introduced by and dependent on the statutes; and it is only necessary to prove special damage to the occupant of the property occasioned by the construction of the railway or its incidental works, and that the complainant is a party interested within the meaning of that phrase in the statute."

In his judgment the words are used in their ordinary and popular sense, because lands affected in the proper exercise of the statutory powers cannot in a legal sense be said to be "injuriously affected." If that opinion had prevailed, it would have been decisive of the present controversy, for it cannot be doubted that the respondent's lands have been most injuriously affected within the meaning which these words convey to a person ordinarily using the English language.

But in the case of the *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243, the law Lords, with the exception perhaps of Lord O'Hagan, accepted the test of liability at Common Law as definitely established. That learned Judge was inclined to agree with the observations of Lord Westbury, already referred to, and expounded a view of the Act which is made attractive by the enlarged principles of public policy, and the solid grounds of equity upon which it rests. He says, p. 264: "The policy of that Act I apprehend to have been to prevent private caprice or selfishness from interfering with the prosecution of works designed for the public benefit; but to do this with strict regard to individual rights, by securing ample compensa-

tion in every case in which individual sacrifice or inconvenience is found to be essential to the general good. It never contemplated that the community should profit at the expense of a few of its members, and, as the condition of redress, it only required proof by the owner of injury to his property." Again, at p. 265: "It appears to me, or it would, as I have said, appear to me if the matter were *res integra*, and unaffected by decision; that wherever there is an injury there ought to be compensation, and that the statutable claim which is now newly established, with new machinery for enforcing it, needs no help from any operation of ancient law." The other Lords, and notably Lord Penzance, while accepting the recognized test, have, as Mr. Justice Gwynne points out, used language which proves that if this were a case falling within the scope of the Lands Clauses Consolidation Act, the injury to the respondent's property would be a proper subject of compensation. Indeed, it would seem to force the appellants to rely upon some substantial difference between their position and that of a company governed by the Imperial Act.

In delivering the opinion of the Judicial Committee of the Privy Council upon the recent appeal of the *Mayor of Montreal* v. *Drumond*, L. R. 1 App. C. 384, Sir Montague Smith said, at p. 410: "Upon the English legislation on these subjects, it is clearly established that a statute which authorizes works makes their execution lawful, and takes away the rights of action which would have arisen if they had been executed without such authority. Statutes of this kind usually provide compensation, and some procedurce for assessing it; but it is a well understood rule in England that though the action is taken away, compensation is only recoverable when provided by the statutes and in the manner prescribed by them. In practice it is generally provided in respect of all acts by which lands are 'injuriously affected,' words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutable authority." Although

the case directly involved a question of French law, the statement is of value as giving the opinion of the Court of final resort for this Province.

In the authorities I have quoted, and in others, the obstruction of access to the adjoining public highway has been adduced as a clear instance or illustration of land being injuriously affected within the meaning of the English Act; but the precise point has been expressly decided. In *Chamberlain* v. *The West End R. W. Co.*, 2 B. & S. 605, the claim was, that the value of houses was depreciated because the highway was stopped up, and the easy access which before existed to them was taken away. In pronouncing the judgment of the Exchequer Chamber. Erle, C. J., said at p. 635: "It is clear, therefore, that this case comes within the words of the enactments referred to, and it appears to be within the principle of law which governs these cases." He refers with apparent approval to *Moore* v. *The Great Sou'hern and Western R. W. Co.*, 10 Ir. C. L. R. 46, where the company without taking any part of the plaintiff's land made a deep cutting in order to lower the road, and so deprived him of the easy access to his premises which he before enjoyed. The same principle was acted upon in *Reg.* v. *The Eastern Counties R. W. Co.*, 2 Q.B. 347.

In *Lyon* v. *The Fishmonger's Company*, L. R. 1 App. C. 662, where the interference was with a water frontage, Lord Chancellor Cairns observed that it would be the height of absurdity to say that a private right is not interfered with, where a man who has been accustomed to enter his house by a highway finds his door made impassable, so that he no longer has access to his house from the public highway. This, he said, would be equally a private injury to him, whether the right of the public to pass and re-pass along the highway were or were not at the same time interfered with. Lord Selborne remarked, p. 684: "The cases as to alterations of the levels of public highways, by which houses immediately adjoining have been deprived of their access to and from the highway, seem to be authorities *a fortiori* on this point, because they had not in them the element of a right *jure naturæ*."

It is no doubt a well founded observation that none of these cases related to a municipal corporation which has raised the level of a road in the discharge of a general public duty. The parties resisting payment of compensation had not been exercising a general jurisdiction over roads, but had been using specific powers entrusted to them by the Legislature for special purposes. Indeed, a case precisely similar in circumstances could scarcely arise in England, but the reports of the United States Courts abound in decisions with respect to the liability of municipalities for causing injury to adjoining properties by altering the grades of streets and roads. The current of these decisions seems at first sight to set in favour of the appellants' contention, and although I think they are distinguishable, it may be useful to refer to some of the most authoritative, not merely because they embody the views of eminent jurists, but because they put in the strongest light the arguments addressed to us at the bar.

In *Nevins* v. *Peoria*, 41 Ill. 502, an analogy was drawn between the right of a man to use his own land, and that of a corporation to raise or lower a street. The Court said, at p. 509: "He may excavate to any depth, or raise the surface to any height, and the neighbouring owner has no right to complain, because his enjoyment of his own lot is not thereby prejudiced. * * The same rule applies to corporations. A city owns the streets for the use of the public, and has the right to grade them in any manner the representatives of the public may deem conducive to its interests. It is not liable for errors of judgment, and if in the process of grading it leaves private property many feet below or many feet above the surface of the street, it is free from all claim for damages on this account, for precisely the same reason that a private person is exempt under similar circumstances."

In *Stetson* v. *Chicago & Evanston R. W. Co.*, 75 Ill. 74, the law was thus laid down, p. 77: "Where no portion of the land is taken, and the damages suffered are consequential by reason of what the corporation does upon its own

land, or that of another, it does not seem there is any warrant for instituting proceedings for the ascertaining of such damages." That is a strong decision, because the constitutional provision was that private property should not be taken or *damaged* for public use without just compensation.

In the very recent case of *Stark* v. *East St. Louis*, 5 Central L. J. 305, it was held to be beyond doubt that a city may establish a grade for the streets, and in doing so, if judiciously and carefully done, it will not be liable for damages by reason of the grade being raised above or sunk below the level of adjoining lots. In *Radcliff's Executors* v. *Mayor of Brooklyn*, 4 Comstock 195, the Court went the length of holding that the excavation of the road so as to cause the adjoining land to cave in, was not an actionable injury.

Similar views have found expression in the Supreme Court of the Union.

In *Smith* v. *Corporation of Washington*, 20 Howard 135, the Court referred with apparent approval to *Callender* v. *Marsh*, 1 Pick. 417, in which the question was, whether the surveyor of highways was liable for digging down a street so as to lay bare the foundations of plaintiff's house and endangér its falling. He had acted under a statute which required that all highways should be kept in repair and amended from time to time, that the same might be safe and convenient for travelling. The Court in that case observed, p. 149: "This very general and exclusive authority would seem to include everything which may be needed towards making the ways perfect and complete, either by levelling them when they are uneven and difficult of ascent, or raising them where they should be sunken and miry."

The Supreme Court also referred to *Green* v. *Borough of Reading*, 9 Watts 282, in which it was held that where the defendants, by virtue of their authority to improve and repair, graded the street in front of plaintiff's house five feet higher than it had been before, the corporation was not liable to an action for any consequential in-

jury to plaintiff's property by reason of such improvement or change of grade in the public street. It was, however, pointed out in *Fernald* v. *City of Boston*, 12 Cush. 574, by the Supreme Court of Massachusetts, that while the old doctrine was correctly laid down in *Callender* v. *Mârsh*, it had been changed by subsequent legislation, which provided that when any owner of land adjoining a highway in a town or city should sustain damage to his property by reason of any raising, lowering, or other act done for the purpose of repairing, he should have compensation. It will be observed that this seems to be at variance with the decision in *Stetson's* case, but it seems to me to be in harmony with the views expressed in *Hall* v. *The Mayor of Bristol.*

But more liberal views have not been without their exponent in the Federal Court.

In *Pumpelly* v. *Green Bay Co.*, 13 Wallace, 177, Mr. Justice Miller, who delivered the opinion of the Supreme Court of the United States, remarked that it would be a very curious and unsatisfactory result if in construing a provision of constitutional law by which the exercise of the power of eminent domain was governed, it should be held that if the government refrains from the absolute conversion of real property to the use of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for the public use. So little did such a narrow and rigid interpretation commend itself to the learned Judge, that he emphatically declared that such a construction would pervert the constitutional provision into a restriction upon the rights of the citizens, as these rights stood at the Common Law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors. He also expressed the opinion of the Court that the decisions founded upon the doctrine that there is

no redress for a consequential injury to the property of the individual arising from the prosecution of improvements of roads for the public good, had gone to the uttermost limit of sound judicial construction.

But, on the whole, the doctrine that municipal corporations are not liable for consequential injuries resulting from the exercise of their lawful powers, when these have been judiciously and properly exercised, seems to be firmly established in the jurisprudence of most of the States of the Union. Mr. Dillon sums up the effect of the cases in the following passages: "Accordingly, the Courts, by numerous decisions in most of the States, have settled the doctrine that municipal corporations acting under authority conferred by the Legislature to make and repair, or to grade, level, and improve streets, if they exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation or in some statute, creating the liability. There is no such liability, even though in grading and levelling the street a portion of the adjoining lot, in consequence of the removal of its natural support, falls into the highway. And the same principle applies, and the same freedom from implied liability exists, if the street be embanked or raised so as to cut off or render difficult the access to the adjacent property." *Dillon* on Municipal Corporations, 2nd ed., sec. 783. So far as I am able to form an opinion, this is a correct statement of the general result of the decisions; but the doctrine has by no means commanded universal acceptance. The language of Mr. Justice Miller, in the Supreme Court, has already been quoted. Mr. Sedgwick, whose views upon a question of this character are admittedly entitled to very great consideration, has expressed his dissatisfaction with its soundness in point of principle. An extract from his discussion seems worthy of citation :—

"To differ from the voice of so many learned and saga-

cious magistrates may almost wear the aspect of presumption; but I cannot refrain from the expression of the opinion that this limitation of the term *taking* to the actual physical appropriation of property or a divesting of the title is, it seems to me, far too narrow a construction to answer the purposes of justice, or to meet the demands of an equal administration of the great powers of Government. * * It seems very difficult in reason to shew why the State should not pay for property of which it destroys or impairs the value, as well as for what it physically takes." *Sedgw.* on Statutory and Constitutional Law, 2nd ed., 462-3. However, it should be noted that the learned author is probably addressing himself to the consideration of the proper direction of legislation, than to the existing state of the law.

In Ohio the doctrine, so far from being recognized, has been deliberately repudiated. The principle by which the Courts of that state have been governed seems to be that where a legally authorized act is done for the good of all to the prejudice of an individual, the whole public should contribute towards the loss. These decisions have been declared not to be law,—at least beyond the State of Ohio—but it has been found impossible to deny that there is much justice and equity in the principle they adopt.

In *Crawford* v. *Delaware*, 7 Ohio St. 465, and *Alexander* v. *Milwaukee*, 16 Wis. 264, rules were laid down which appear to make the right to compensation largely depend upon the degree of prudence and reasonable foresight exercised by the person aggrieved. It was held that where the lot was unimproved there was no such right, because it must be presumed that the owner purchased with a view to future improvements being made in a reasonable manner. Further, that where the grade has not been established, the owner must use reasonable care and judgment in making improvements with reference to the right of the corporation to make a proper grade. But that where the grade had been established, and the owner in good faith built with a view to it, there must be compensation. The

case, however, is especially noteworthy in connection with our present subject, for its explanation of the distinction between the right of the public to use a highway, and the right of the owners of adjacent properties; and for its definition of the character of the interest of the individual The Court said: "The latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; and an incidental title to certain facilities and franchises assured to them by contracts and by law, and without which the property would be comparatively of little value. This easement, appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

I have thought it might serve a useful purpose to refer to these cases, because the exemption of municipalities from liability for raising or lowering the streets is very emphatically laid down in many text-books much used by the profession and cited to our Courts. I think that the adoption of the rule is due to the circumstance that in most of the State constitutions provision is made for compensation only where lands are taken, entered upon, or used, not where they are injuriously affected. If these words had been employed a different conclusion might have been arrived at by the Courts. It is the introduction of these words which seems to withdraw the present case from the scope of their reasoning. It may be conceded on behalf of the respondent, that but for their presence the claim would be unsustainable. By their addition to the former law the rights of the claimant are enlarged, and the decisions in *Croft* v. *Peterborough*, 5 C. P. 35, and *Reid* v. *Corporation of Hamilton*, 5 C. P. 269, as Mr. Justice Gwynne has very clearly shewn, no longer stands in his way.

Applying in its fullest sense the test recognized in *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243, I think it does not exclude the respondent's title to relief. Would not the corporation be liable to an action at law,

but for the legalization of their proceeding and their consequent protection by statute? It is conceded that if this alteration had been made in the road by a private individual for his own convenience or advantage, he would have been liable to an action. He would have inflicted an injury upon the respondent without lawful authority.

Now, whence does the corporation of the county derive authority which entitles it to build this embankment and place these railways upon the highway? Is it not solely by virtue of the jurisdiction with which it is clothed by the statute? It has no inherent right to interfere with highways, and but for the statute its officers would be mere trespassers in executing these works. By its operations in the exercise of that power the respondent's land has been injuriously affected, and while the law prevents her from bringing an action against the company, it is no longer so unjust as to refuse her compensation. I think that this conclusion comes within the letter and spirit of the enactment; that it is not opposed to any authoritative decision; and that it is in accord with the broad principle of public policy, generally recognized in countries possessing free institutions, that individual rights shall not be sacrificed for the general good, and that the citizen shall not be required to relinquish his private property to the state without receiving a fair equivalent.

The appeal must be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, J J.A, concurred.

Appeal dismissed.

AUSTIN V. GIBSON ET AL.

Principal and surety—Giving time to one of three executors.

The testator, who was surety in a covenant for the payment by the defendant S. to the plaintiff of a sum of money, died leaving a will, by which he appointed S. and the other two defendants executors. After his death. S., on his own behalf, made various payments on account of the debt, and being unable to pay the balance when due, he got the plaintiff to take his promissory note therefor, S. having arranged with his bankers to discount this note upon its being endorsed by the plaintiff, and the plaintiff received the money thereon. When the note matured part of the amount was paid by S., and the balance renewed from time to time by notes of S. endorsed by the plaintiff as before, and the last renewal being unpaid, the plaintiff sought to recover the amount from the defendants as executors. In the dealings between the plaintiff and S. as to the promissory note, and the various renewals, no reference was made to the estate of the surety or to the covenant, and the co-executors of S. had no notice of such dealings,

Held, affirming the judgment of the Common Pleas, that the estate of the surety was released from liability by the dealings between the plaintiff and S.

This was an appeal from a judgment (*a*) of the Common Pleas discharging a rule *nisi* to set aside the verdict for the plaintiff and enter it for the defendants. The facts are fully stated in the judgment below.

(*a*) The judgment in the Court below, which turned on the facts only, has not been reported. It was as follows :—

WILSON, C. J.—The judgment given by the learned Chief Justice of the Queen's Bench upon the demurrer, must remain as it is, as there has been no appeal from it.

He held the special replication good in law, and the second plea bad in law.

The declaration on the special count, and on the account stated, the third plea and the second replication require to be considered.

The first count was proved.

The account stated was proved so far that John Scott, one of the executors, gave a promissory note payable at a future day for the debt claimed, that is for his own debt.

An account may be stated by one executor and it will be binding on the estate if honestly made, otherwise it will not: *Smith* v. *Everett*, 27 Beav. 446.

Here there are two questions.

1. Did Scott as a fact state an account with the plaintiff for and in respect of the estate he represented as one of three executors—or was it only in respect of his own liability as the principal debtor ?

2. If he did it was an accounting to be paid at a future day, the time the note had to run, and by that very accounting by which time was

The case was argued on the 15th May, 1879 (*a*).

T. H. Spencer, for the appellant. The liability of the defendants as executors arises on the deed made by the surety Wm. Gibson, and the covenant has never been satisfied or released. There is no evidence of any binding agreement to give time to Scott; merely taking the notes did not suspend any remedy on the deed. It is clearly shewn the notes were taken at the request and with the consent of Scott, and such consent affected Scott in every capacity. Executors are one person in law, and there being no fraud, the consent of Scott was the consent of

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given to pay, arises the same question which was discussed on the demurrer.

Was the estate thereby charged?

We need not re open the argument upon that point, although I should like to reconsider the matter before assenting to it; for if time were given at all it was upon a contract, and as a rule an executor cannot bind his co-executors by such a contract: *Turner* v. *Hardey*, 9 M. & W. 770, 773, 774; *Scholey* v. *Walton*, 12, M. & W. 510, 513, 514; and secondly, if by giving of time to Scott, the principal debtor, the surety was discharged, a subsequent agreement by the executors to continue the suretyship for Scott would, I think, be a devastavit of the estate, to that extent entailing upon the executors as a consequence personol liability.

The account stated may be considered together with the second replication on the matter of fact only, namely, did Scott state the account as an executor of the deceased, or did he as an executor assent to the giving of time to himself as principal debtor?

The finding of the learned Judge, although not express in language upon the point, does substantially determine it.

He found the dealings between the plaintiff and Scott were respecting their private transactions as creditor and debtor, and there is nothing in the evidence to show the contrary.

It is a matter of fact and not of law in what capacity he acted.

A person may be tenant in common with himself if he hold in several rights.

The rule should be discharged.

GWYNNE, J.—The gist of the issue in fact tried upon the replication to the second plea, which replication the late Chief Justice of this Court, upon demurrer, held to be good, which judgment is not disputed, is that Scott as executor of Gibson deceased, that is in the character of executor, assented to the time given by plaiintiff to the principal debtor who also was the same Scott, and I am of opinion that the evidence shews that the dealings of plaintiff with Scott were with him as principal debtor only and not with him as an executor, although no doubt the plaintiff knew Scott to be an executor; so also there is no evidence of any account stated with Scott in his capacity of executor.

GALT, J., concurred.

Rule discharged.

(*a*) *Present*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

his co-executors. The alleged giving of time was not behind the back of the surety. The fact that the executors through Scott, had notice and knowledge and did not object, implies consent. Moreover, there was an implied reservation of rights against the estate of the surety. He cited the following authorities: *Smith* v. *Smith*, 2 C. & M. 231; *Townson* v. *Tickell*, 3 B. & Ald. 40; *Cole* v. *Miles*, 10 Ha. 179; *Davey* v. *Prendergrass*, 5 B. & Ald. 187; *Chitty* on Bills 128, 129; *Davis* v. *Gyde*, 2 Ad. & Ell. 623; *Worthington* v. *Wigley*, 3 Bing N. C. 454; *Curtis* v. *Rush* 2 Ves. & B. 416; *Molsons Bank* v. *McDonald*, 40 U. C. R. 529; 2 App. R. 102; *Bailey* v. *Griffith*, 40 U. C. R. 431; *Bedford* v. *Deakin*, 2 B. & Ald. 210, 217; *Harris* v. *Farwell*, 15 Beav. 31; *Winter* v. *Innis*, 4 M. & Cr. 108; *Thompson* v. *Percival*, 5 B. & Ad. 925; *Swire* v. *Redman*, 1 Q. B. D. 540; *Williams* on Executors, 7th ed., 911, 946; *Roper* on Legacies, 845; *Smith* v. *Everett*, 27 Beav. 446; *Simpson* v. *Gutteridge*, 1 Mad. 616; *Herbert* v. *Piggott*, 2 C. & M. 384; *Kilsock* v. *Nicholson*, Cro. Eliz. 478; *Petty* v. *Cooke*, L. R. 6 Q. B. 790; *Pourthouse* v. *Parker*, 1 Camp. 82; *Caunt* v. *Thompson*, 7 C. B. 400; *Woodcock* v. *Oxford*, 1 Drew. 521; *Wyke* v. *Rogers*, 1 D. M. & G. 408.

F. Mackelcan, Q. C., for the respondents. The discount at the bank of the note made by Scott and endorsed by the defendant was effected by Scott, and the money was paid to the plaintiff. This amounted to payment and satisfaction of the covenant sued on. If the note did not amount to payment, taking the note and endorsing it over to the bank at all events in equity suspended the remedy on the covenant, and was a giving of time. There is no evidence that Scott, as executor, consented to the giving of time. The plaintiff dealt with Scott in his personal character only in which his interests conflicted with the interests of the estate of the surety. Notice to one executor only would not prevent the estate being discharged; an actual affirmative consent of the surety is necessary to prevent his discharge. Nor is one of several executors the agent of the others so as to bind them by his several contract. The cases

shew that executors have no power to bind the estate of the testator by a new contract, and their consent to give time is in effect a new contract. He cited, *Crowe* v. *Clay*, 9 Ex. 604; *Williams* on Executors, 8th ed., 949, 950; *Belshaw* v. *Bush*, 11 C. B. 191; *Turner* v. *Hardey*, 9 M. & W. 770; *Blake* v. *White*, 1 Y. & C. Exch. 420, 620; *Scholey* v. *Walton*, 12 M. & W. 510; *Sneesby* v. *Thorne*, 7 D. M. & G. 399; *Holme* v. *Brunskill*, L. R. 3 Q. B. D. 498; *Rees* v. *Berrington*, 2 Ves. Jr. 540.

June 6, 1879. MOSS, C. J. A.—The question is, whether the estate of a deceased surety has been discharged by dealings between the principals. The peculiarity of the case is, that the surety appointed the debtor one of his executors, and that the transactions out of which the alleged equity arises, took place between him and the creditor without the knowledge or consent of his two co-executors.

There seems to be no real dispute about the facts, which admit of a simple statement: The testator, William Gibson, by deed covenanted for the due payment by the defendant John Scott, of $2,500 to the plaintiff in five equal half-yearly payments, commencing on the 1st July, 1873. He died in 1873, having made Scott one of the executors of his will. When the last payment of Scott fell due on July 1st, 1875, he was in arrears for the preceding instalment and for interest. On the 17th July he made his promissory note for $1,152.50 to cover the whole balance then due together with interest up to the date of maturity. I shall explain hereafter the manner in which this note was used. On the 28th October, 1875, it was renewed at three months, and so on from time to time with gradual reductions, until the first May, 1877, when Scott made a note at four months for $618, which is the amount the plaintiff now seeks to recover from the estate. Scott made neither of his co-executors aware at any time of what transpired between himself and the plaintiff with reference to the extension of time. There was no communica-

tion of any kind between him and them upon the subject. No reference to the deed of suretyship seems to have been made on any of the occasions, when Scott's notes were given. The learned Judge found that the plaintiff dealt with Scott without the knowledge of his co-executors: that time was given to the principal debtor without the knowledge of the representatives of the surety; and he accordingly entered a verdict for the defendants. A rule *nisi* to enter a verdict for the plaintiff having been discharged, this appeal has been brought.

Learned arguments were addressed to us upon the effect of extending the time of the payment under the special circumstances that here exist. It was argued that Scott, as one of the executors, had power to bind the estate by his consent to the various extensions, and that through him the estate was affected with notice of the several arrangements. It was urged that the executors being all one person in contemplation of law, the assent and acquiescence of Scott was in the absence of fraud equivalent to that of the three executors. But even from the evidence already cited it would appear that what Scott did was very different from an acquiescence by one of several executors to an extension of time being given to a principal debtor, who was a third party. In that case he would be exercising his independent judgment whether this course was best for the estate, and his sole assent might, although I do not say it would, be binding. But in this case he was making an arrangement for his own benefit, and engaging in a transaction in which his interest might conflict with his duty. If the rule of law be that an extension of time given by virtue of positive contract between the creditor and the principal discharges the surety, unless his consent be obtained, or the rights against him be reserved, it does not seem too much to expect that a creditor dealing with an executor placed in so ambiguous a position should assure himself of the assent of the impartial executors. It is true that the doctrine that a mere extension of time, although not shewn to have been attended with prejudice to the

surety, effects his discharge, has not of recent years met with much favour. It has been deemed a refinement of equity not to be refined upon, and its practical justice has been denied.

In *Petty* v. *Cooke*, L. R. 6 Q. B. 790, Blackburn, J., while characterizing the reasoning upon which Lord Eldon had proceeded as highly technical, observed at p. 795: "It is clear that a creditor who gives time to the principal debtor without reserving his rights against the surety, and alters the rights of the surety, discharges him; but that time given by a creditor, which in numberless cases does not injure the surety, should discharge him, is, to my mind, not justice, although established by Courts of Equity." I may also refer to the observations made. and the cases cited by the present Chief Justice of the Court of Queen's Bench, in pronouncing judgment upon the demurrers in this case. But whatever doubts may be entertained of the abstract equity of the doctrine, I apprehend that it must be taken to be settled by authority binding upon us, with the qualification that the mere extension shall not be a discharge if it is perfectly manifest upon the face of the transaction, and without enquiry, that it could not possibly prejudice the surety.

Even in *Petty* v. *Cooke*, Lord Blackburn seems to concede that the rule is established. In *Croydon Gas Co.* v. *Dickinson*, 2 C. P. D. 46, Amphlett, J. A., at p. 51, enunciated the doctrine in the following terms: "The rule is, that when time is given, or the position of the surety has been altered by the dealings of the principals, the surety is discharged. That must, however, be taken with certain limitations; that is to say, if it depends upon enquiry, the Court will not go into that inquiry, and unless the fact is self-evident, the Court will not consider the question; and of course the rule will not be applicable where the change cannot be otherwise than advantageous to the surety."

In the very recent case of *Holme* v. *Brunskill*, L. R. 3 Q. B. D. 495, the Lord Justices differed in opinion upon

the question of whether it should have been submitted to the jury to determine whether the new agreement with the principal had made any substantial or material difference in the relation between the parties, as regarded the principal's capacity to fulfil the condition of the bond.

The majority of the Court held that the question was not one proper for the jury. It was apparently conceded on behalf of the plaintiff that in the case of an agreement to give time a surety was discharged, even if it were not shewn that his position was materially altered for the worse. The attempt was to draw a distinction between cases where time was extended, and other cases. While admitting the existence of this distinction, Cotton, L. J., who delivered the opinion of himself and Thesiger, L. J., stated the result of the decisions to be that where a creditor binds himself to give time to the principal debtor he does, except when there is an express reservation of his rights, deprive the surety of his right at once to pay off the debt which he has guaranteed, and to sue the principal debtor, and without enquiry the surety is discharged. He then formulated the general doctrine in the following terms:—

"The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge

whether or not he will consent to remain notwithstanding the alteration, and that if he has not so consented he will be discharged."

Brett, L. J., who dissented from the judgment, and thought that the doctrine of the release of suretyship had been carried far enough, and to the verge of sense, said, at p. 508: "The proposition of law as to suretyship to which I assent is this: if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration which happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

It appears to me that in this elaborate statement the learned Judge leaves open the question whether it is not authoritatively settled that an extension of time is, subject to the exceptions already mentioned, a material alteration. The question that was immediately engaging his attention related to a special change in the terms of a demise which formed the subject of the guarantee. My own opinion is, that the doctrine has often been productive of great injustice, and that it certainly ought not to be extended, but it appears to me that this Court is not at liberty to treat it as open to review.

It was strenuously argued that the knowledge of the surety that an extension of time is in contemplation, and his neglect to raise any objection, have been deemed in equity tantamount to consent, and that as an executor represents the estate, Scott's knowledge was equivalent to a consent binding upon the estate, and displaced the defendant's equity.

The case of *Woodcock* v. *Oxford and Worcester R. W. Co.*, 1 Drew 521, was specially relied upon in support of

this proposition. But the principles upon which the Court acted do not meet the present difficulty. The bill was filed by a firm of solicitors, who had become sureties for the performance of a contract by three persons in partnership. Two of these parties retired, and another person was substituted. Afterwards the contract was materially varied by altering the time at which it was to be completed, the terms and mode of payment to the contractors, and other particulars. The sureties were not parties to these changes, and gave no express consent, but they had been the solicitors of the old, and continued to act as the solicitors of the new firm, and had prepared the requisite instrument for carrying out the new arrangements. The decision, as might be expected, was, that they must be believed to have known and impliedly consented to the arrangements of which they subsequently complained.

That is a satisfactory authority to shew that the acquiescence of a surety under circumstances when he was called upon in common fairness to object, if he did not intend to be bound, precludes him from objecting that he is discharged by an alteration in the terms of the agreement, however material; but it is quite beside the question of the power of one executor to represent and bind the estate, when he is the principal for whose benefit the extension is being sought.

I think, however, that there are special circumstances clearly shewn in the evidence which relieve us from the necessity of discussing more fully the plaintiff's proposition, that the dealings being with one of the executors the legal consequence is, that the estate should be held to have consented to the extension, or that a reservation of rights against the estate should be implied. It is, in my opinion, beyond doubt that the dealing was not with Scott as an executor but as an individual. His position as executor was never thought of either by himself or the plaintiff, and formed no element in their negociations. This conclusion depends not merely upon the positive evidence that the original extension was

given without the guarantee or Scott's position as executor being ever mentioned, but upon the very nature of the transaction. This was not the simple case of the debtor giving to the creditor, and the creditor receiving from the debtor, a promissory note. From the plaintiff's own account it appears that Scott had arranged with his banker for the discount of a note made by himself, and endorsed by the plaintiff, and that the proceeds were to be delivered to the plaintiff. The plaintiff had a certain line of discount at his bank, and when Scott proposed to him to take the promissory note he asked how this would be likely to affect his bank discount. Scott assured him that it would not affect it at all, as he had made arrangements with the bank agent, and the plaintiff then assented to the proposal. Scott then procured the note to be discounted, and the proceeds were paid by him to the plaintiff. All the renewals were arranged by Scott with the bank. The truth is, that the plaintiff being anxious to receive payment, which Scott was at the time unable to make, was willing to assume the position of accommodation endorser in order to enable Scott to obtain a loan from the bank. The money was borrowed, and actually came into Scott's possession before being paid over to the plaintiff. No clearer proof could be furnished that the dealing was with him solely as his debtor, and not as an executor of the surety. On this state of facts there is no room for the argument that the Court should find the existence of either a consent or a reservation of rights against the surety.

The appeal should be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, J J.A., concurred.

Appeal dismissed.

PARSONS V. THE STANDARD INSURANCE COMPANY.

Insurance—Prior and subsequent insurance.

Where an applicant for insurance in answer to the question, "What other insurance, if any, is there upon the property, and in what office?" replied, shewing four existing insurances of $2,000 each, but by mistake mentioned the name of the Canada Fire and Marine Insurance Company, as one of them, instead of the Provincial.

Held, reversing the judgment of the Queen's Bench, 43 U. C. R. 603, that under the 8th statutory condition the policy was void.

After the issue of the policy, the insured allowed one of the above policies to drop, and substituted another for a similar amount in a different company.

Held, that the policy was also avoided by the non-communication of this new insurance.

Unnecessary length of appeal books remarked upon.

THIS was an appeal from a judgment of the Court of Queen's Bench discharging a rule *nisi* to set aside a verdict for the plaintiff, and enter a verdict for the defendants, reported 43 U. C. R. 603. The facts are fully stated there, and in the judgment on this appeal.

The case was argued on the 6th of March, 1879 (*a*).

Bethune, Q. C., for the appellant. It is clear that upon the true construction of the condition as to prior and subsequent insurances, this policy must be held void, as there was no notice to the appellants of the prior insurance in the Provincial Insurance Company, nor of the subsequent policy in the Queen's Insurance Company. The Court below decided the case against us on the ground that the mistake in the name of one of the companies was immaterial, so long as the true amount of the insurance was given; but such a mistake cannot be said to be immaterial, as it is most important to the insurer to know the companies who have insured the property, because some companies are more strict than others in taking risks, and in accepting a risk reliance is placed on the reputation of previous insurers. The term subsequent insurance was intended to apply to any

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(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

insurance which changed the nature of the risk, altogether irrespective of the amount; and the appellants clearly had an interest in knowing in what company the subsequent insurance was effected. He cited: *Weinaugh* v. *Provincial Ins. Co.*, 20 C. P. 405; *Mason* v. *Andes Ins. Co.*, 23 C. P. 37; *Hatton* v. *Beacon Ins. Co.*, 16 U. C. R. 316.

H. Cameron, Q. C., and *Creelman*, for the respondent. Where the true amount of insurance is given, as in this case, the unintentional error in the name of one of the companies cannot vitiate the policy. In reference to the non-notification of the insurance in the Queen's Insurance Company, it is submitted that the clear and manifest meaning of the condition is that it was only intended to apply to a subsequent assurance when it increased the amount of the existing insurances.

June 14, 1879. BURTON, J. A., delivered the judgment of the Court.

The questions raised before us on this appeal are confined to the construction of the conditions as to other insurances.

The application upon which this policy is founded, and which is declared to be the basis of the liability of the company, contains, among other enquiries, the following:

What other insurance, if any, is there upon the property, and in what office? To this the applicant replied, shewing four existing insurances, for $2,000 each, in other offices, but, by mistake, mentioning the Canada Fire and Marine as one of them, instead of the Provincial.

The portion of the 8th statutory condition as varied in this case by the defendants, which bears upon this answer, is as follows:

"The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein * * And it is hereby covenanted and agreed that the application of the assured, and upon which this insurance is granted, * * and all things therein contained, shall be taken and considered as

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Held, reversing the judgment of the Queen's Bench, 43 U. C. R. 603, that under the 8th statutory condition the policy was void.

After the issue of the policy, the insured allowed one of the above policies to drop, and substituted another for a similar amount in a different company.

Held, that the policy was also avoided by the non-communication of this new insurance.

Unnecessary length of appeal books remarked upon.

THIS was an appeal from a judgment of the Court of Queen's Bench discharging a rule *nisi* to set aside a verdict for the plaintiff, and enter a verdict for the defendants, reported 43 U. C. R. 603. The facts are fully stated there, and in the judgment on this appeal.

The case was argued on the 6th of March, 1879 (*a*).

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insurance which changed the nature of the risk, altogether irrespective of the amount; and the appellants clearly had an interest in knowing in what company the subsequent insurance was effected. He cited: *Weinaugh* v. *Provincial Ins. Co.*, 20 C. P. 405; *Mason* v. *Andes Ins. Co.*, 23 C. P. 37; *Hatton* v. *Beacon Ins. Co.*, 16 U. C. R. 316.

H. Cameron, Q. C., and *Creelman*, for the respondent. Where the true amount of insurance is given, as in this case, the unintentional error in the name of one of the companies cannot vitiate the policy. In reference to the non-notification of the insurance in the Queen's Insurance Company, it is submitted that the clear and manifest meaning of the condition is that it was only intended to apply to a subsequent assurance when it increased the amount of the existing insurances.

June 14, 1879. BURTON, J. A., delivered the judgment of the Court.

The questions raised before us on this appeal are confined to the construction of the conditions as to other insurances.

The application upon which this policy is founded, and which is declared to be the basis of the liability of the company, contains, among other enquiries, the following:

What other insurance, if any, is there upon the property, and in what office? To this the applicant replied, shewing four existing insurances, for $2,000 each, in other offices, but, by mistake, mentioning the Canada Fire and Marine as one of them, instead of the Provincial.

The portion of the 8th statutory condition as varied in this case by the defendants, which bears upon this answer, is as follows:

"The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein * * And it is hereby covenanted and agreed that the application of the assured, and upon which this insurance is granted, * * and all things therein contained, shall be taken and considered as

part and portion of this policy; and if, in the said application, * * the assured make *any erroneous or untrue representation* or statement, or omit to make known to the company any fact material to the risk, * * this policy shall be void."

The learned Chief Justice, in delivering judgment in the Court below, appears to consider that the only material portion of this enquiry, and the answer to it, was, the *amount* of the insurance, and that an unintentional error in the name of one of the companies ought not to vitiate the policy. But whether certain statements are or are not material, when parties are entering into contracts of this nature, are matters upon which there may be room for great differences of opinion.

The importance of being informed of the names of the offices which are jointly interested in the risk is obvious to all who have any acquaintance with the law and practice of insurance, and nothing therefore can be more reasonable than that the persons assuming the risk should determine for themselves what they deem to be material, and to stipulate for information being given as to the offices in which the other insurances are existing; and if they choose to do so, and to stipulate that if any erroneous or untrue representation be made respecting it the contract they are entering into shall be void, it is competent to them to do so, and it is not in the power of Courts of justice to decide that any portion of that representation is not material. The Courts have, it is true, the power now, under a recent statute, to declare that a condition is not just and reasonable, and to annul it altogether, but no such question arises in the present case.

We are compelled, therefore, I think, to hold that the present case falls within this principle, and that, much as we may regret the necessity for doing so, we are compelled to give effect to the contract the parties have themselves made; and as the answer to the enquiry for the names of the offices has been erroneously given, to hold the contract void. This would be sufficient for the decision of the case, but we are unfortunately compelled to differ with the Court

below in their construction of the condition as regards any subsequent insurance.

We are, I think, bound "to the letter of the words used," and are not at liberty to disregard them, and to place upon them, to quote the learned Chief Justice's language, a different interpretation. "when their spirit and substance point to a fairer and more liberal construction," unless the words used are ambiguous, in which case I fully concur in the view he expresses, that the instrument should be read most strongly against the parties who prepared it. Here the words used are those prescribed by the Legislature, and admit of but one construction; they apply to any "subsequent insurance" in any "other office," and apart from the preciseness of the language, the importance of being informed of their partners in the risk apply to subsequent as well as prior insurances, and may have influenced the company in adopting the condition in its present shape.

We are not at liberty to say that any subsequent insurance in any other office must be held to mean any insurance exceeding $8,000. We can but speculate as to the motives or reasons of the parties in adopting the statutory form without variations in this respect; but whatever purpose was intended to be served, the terms used are clear and free from ambiguity, and we are bound to give effect to them as the only authentic expression of the intention of the parties.

This appeal therefore should be allowed, with costs, and the rule made absolute to set aside the verdict and enter it for the defendants.

Our attention has been called to the unnecessary length of the appeal books in this case. The simple question for decision was, the construction to be placed upon the condition of a policy of insurance, and the case might have been stated upon two, or at least three, pages of this appeal book. Instead of this a mass of evidence and other matter has been printed, having no bearing whatever upon the point presented for adjudication, covering 129 pages, and imposing upon us an enormous labour and waste of time

in the perusal of it. It appears to us to be a very grave abuse and violation of the rules which we have made on the subject, and we do not intend to impose upon the Registrar the task which the appellants have cast upon us, of wading through this mass of matter for the purpose of discovering whether some portion of it may properly be applicable to this appeal, but we disallow the whole of the appeal books in the taxation. If a similar case should occur again after this warning, it will be our duty seriously to consider whether it is not a sufficient reason for refusing the whole costs of the appeal.

Appeal allowed.

Marrin et al. v. Stadacona Insurance Company.

Insurance—Loss, if any, payable to third party—Cancellation.

The plaintiffs effected an insurance with defendants, "loss, if any, payable to H." as security for any balance of account that might be due H.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 556, that H., in the absence of authority from the plaintiffs, had no power to surrender the policy for cancellation before any loss had happened, and that on the evidence no such authority was shewn.

This was an appeal from the judgment of the Queen's Bench, discharging a rule *nisi* to set aside the verdict for the plaintiffs, and to enter it for the defendants, reported 43 U. C. R. 556. The pleadings and facts are fully stated there.

The case was argued on the 23rd May. 1879. (*a*)

Robinson, Q. C., and *H. J. Scott*, for the appellants. The loss under the policy having been made payable

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(*a*) *Present.*—Moss, C.J.A., Burton, Patterson, and Morrison, JJ. A.

to Hughes Brothers, and the policy left in their custody and control, with the knowledge of both the plaintiffs and the defendants, Hughes Brothers became and were *ipso facto* the agents of the plaintiffs in dealing with the policy, and the plaintiffs are estopped from denying that Hughes Brothers had authority to surrender it. The handing over of the policy by a clerk of Hughes Brothers to the defendants, and the acceptance by Hughes Brothers of the certificate for the unearned premium, and the subsequent allowance of the same in the account between them and the defendants, constituted a complete surrender and cancellation of the policy; and the plaintiffs cannot now set up and rely upon any alleged mistake on the part of the clerk of their agents to the prejudice of the defendants. The findings of the learned Judge who tried the case are incorrect. The possession of the policy by Hughes Brothers, the delivery up and cancellation of the same, the acceptance of the certificate for the unearned premium, and the payment thereof, were much stronger evidence and entitled to more weight than the evidence given on behalf of the plaintiffs, even if they are not estopped under the facts proved in evidence from denying the surrender and cancellation of the policy.

They cited *Bank of Hamilton* v. *Western Insurance Co.*, 38 U. C. R. 609; *National Insurance Co.* v. *Crane*, 16 Md. 26, 286, 293; *Grosvenor* v. *Atlantic Fire Insurance Co.*, 5 Duer. 517; *Ennis* v. *Harmony Fire Insurance Co.*, 3 Bosworth, 516; *Mechanics' Building Society* v. *Gore District Insurance Co.* 2 App. R. 151; *Wood* on Insurance, 266, 567; *May* on Insurance. 545, *R. & J's.* Dig., 1857.

Bethune, Q. C., and *Ferguson*, Q. C., for the respondents. The contract was between the respondents, who were the assured, and the company, and the effect of the words in the policy "loss if any payable to Messrs. Hughes Brothers," was to direct that the payment of any sum which should accrue in consequence of a loss should be made to Hughes Brothers. It did not operate as an assignment of the policy: *Livingstone* v. *The Western Assurance Co.*, 16 Gr. 9; *Carpen-*

ter v. *The Providence Washington Insurance Co.*, 16 Peters, 495. It may well be, that after the loss Hughes Brothers, if any thing remained due to them from respondents, under the recent changes in our law could have sued for the amount of the loss, although in such case it would appear that the respondents would have been necessary parties to the suit (*Ennis* v. *The Harmony Insurance Co.*, 3 Bosworth 516); but it does not follow from that that before loss Hughes Brothers could on behalf of the respondents cancel the contract. The learned Judge who tried the cause has found in accordance with the fact, that Hughes Brothers had no power to bind the respondents by an agreement to cancel. It clearly appears that the alleged cancellation was by a mistake of a clerk of Hughes Brothers, and was not intended on their part, and did not bind the respondents. Moreover, the policy not being negotiable, the delivery of it by Hughes Brothers to the Company did not operate to extinguish the contract with the respondents.

June 17th, 1879. MOSS, C. J. A., delivered the judgment of the Court.

We are of opinion that the judgment of the Court of Queen's Bench in favour of the plaintiffs ought to be affirmed.

The defendants resist the plaintiffs' right to recover upon a policy of fire insurance, effected in their name, upon the ground that Messrs. Hughes Brothers, to whom the amount of any loss that might occur was made payable, and in whose possession the policy was, agreed, in consideration of the amount of the premium for the time covered by the policy, to deliver it for cancellation, and it was accordingly delivered up and cancelled before the fire. This defence raises the question whether Hughes Brothers had the power to consent to a cancellation, and whether a binding consent was given, to both of which the evidence was addressed. The learned Judge, who tried the case without a jury, found that the policy was effected by the plaintiffs for their own benefit,

and that the memorandum on the policy was made as a security to Hughes Brothers for the payment of any balance of account that might be due, and that they had no authority, as agents of the plaintiffs, to surrender the policy, and that they never did surrender it.

As we agree that the proper conclusion is, that any surrender by Hughes Brothers, without the authority of the plaintiffs, was futile, it is unnecessary to criticize the evidence, which it is contended establishes an actual surrender.

The defendants felt that it was impossible to struggle successfully against the current of authority, which shews that the mere circumstance of the loss being payable to these gentlemen did not entitle them to treat the policy as absolutely their own: *May* on Insurance, sec. 545; *Carpenter* v. *Providence Washington Insurance Co.*, 16 Peters, 495.

But their learned counsel contended that the circumstances shewed that it was intended that they should have full power to deal with the policy, and consent to its cancellation. It appeared that they were large creditors of the plaintiffs, and that it was through their intervention this policy was effected, and that it was delivered to them and remained in their possession. They also held another policy on the plaintiffs' property, for a large amount, as collateral security for their claim. They were stockholders in the defendants' company, and liable for calls. The company having become embarrassed, by reason of large losses, were desirous of arranging with their policy holders for surrenders, and did arrange with Hughes Brothers for the surrender of other policies they held, in consideration of applying the amounts of the unearned premiums upon the calls. Upon the suspension of business by the defendants, which appears to have taken place about the end of the month of June, 1877, Hughes Brothers promptly wrote the plaintiffs a letter, informing them of this fact, and of the necessity for reinsuring, and asking them, if they were going to do so, whether they would reinsure in Barrie,

where they resided, or in Toronto. The receipt of this letter is denied. Hughes Brothers held a policy effected by the plaintiffs in the Western Insurance Co., loss, if any payable to them, which nearly covered the amount of their claim, so that their interest in this policy was comparatively trifling. They determined to surrender a number of other policies, which they held in the defendants' company, but it is denied that there was any intention of surrendering the plaintiffs' policy. Instructions were given to Mr. Convey, a clerk, to arrange for the cancellation of the other policies, and he through mistake, as he declares, delivered up this with the rest. Both Marrin and Hughes, in their evidence, denied that any authority had been given by the former to the latter to deal with this policy. Mr. Scott acutely argued that Mr. Hughes stated that Convey had no authority to deliver up the policy without his permission, and that hence it was to be inferred that Hughes's permission would have been sufficient authority. But when the language of Mr. Hughes upon this particular subject and the whole context are fairly considered, they are quite incapable of this interpretation. The report of his evidence is as follows:

"I did not know about the policy being given up to the Stadacona. I have learned since that the other policies were given up. I am satisfied that I saw that every policy had been transferred, and receipts obtained. I did not consider that anyone had authority to give the policies up without my permission. I have heard since that Convey gave up the policies. He should not have done so without my permission.

Q. But he had authority to cancel all the other policies that you were interested in, except the one in question?

A. I presume so.

Q. Then he had authority to give up all the policies that he had?

A. That is exactly where the issue is. He might have given up the policies that he cancelled, but he had not authority to give up the Marrin policy."

It would be building far too much upon an isolated expression to deem this to be proof of authority sufficient to countervail his own positive testimony as well as that of Marrin.

On the single ground that Hughes Brothers are not shewn to have been authorized by or on behalf of plaintiffs to surrender their policy for cancellation, we are of opinion that the appeal should be dismissed, with costs.

Appeal dismissed.

DEACON V. DRIFFIL.

Insolvent Act of 1875, *secs.* 84 *and* 106—*Secured creditor—Realization of security by—Right to prove for deficiency,*

A creditor holding security from the insolvent may, under sections 84 and 106, assume any one of three positions, either release his security and prove as an unsecured creditor, or he may value his security and prove for the whole debt less the valuation, or he may outside of insolvency proceedings realize his security in any manner authorized by law.

The plaintiff, who was mortgagee of lands of the insolvent, obtained against the assignee the usual decree for sale with a special direction that he should be at liberty to prove against the estate for any deficiency.

Held, reversing the decree of Proudfoot, V. C., that under sections 84 and 106, the plaintiff was not entitled to prove for such deficiency.

Re Hurst, 31 U. C. R. 116, commented on, and questioned.

THIS was an appeal from a decree of Proudfoot, V. C., The facts shewn by the bill and answer were that Dowler Bros. made a mortgage to the plaintiff dated 10th July, 1876, to secure $400 and interest, covenanting to pay the principal and interest at six per cent. per annum : that a balance of $431.80 was due at the date of the filing of the bill, the time for payment having elapsed : that Dowler Bros. became insolvent, and the defendant was duly appointed

assignee of their estate and effects as such assignee, and became entitled to the equity of redemption: that the equity of redemption was of no pecuniary value: that the plaintiff never proved any claim under the Insolvent Act against the estate of the insolvents.

The prayer followed the form usual in such suits, asking for payment of the $431.80 with interest and costs, and in default a sale of the premises: and that defendant might be ordered to pay the balance of the mortgage debt and costs after deducting the amount realized by the sale.

The defendant in his answer averred that he would not have answered if the plaintiff had not prayed for this payment of the balance.

The cause was heard on bill and answer, and a decree was made directing payment or in default thereof a sale; with the further order that in case of a deficiency arising after the sale the plaintiff should be at liberty to prove against the estate of the insolvents for the deficiency.

The case was argued on the June, 1879 (*a*).

Ferguson, Q. C., for the appellant. The respondent must be held to have accepted his security in full satisfaction of his claim, since he filed his bill against the plaintiff without having proved his claim against the estate: sec. 84 of the Insolvent Act of 1875. Under the Act the creditors are entitled to the privilege of paying a secured creditor upon the basis of a valuation provided for therein, before he can take any proceedings by which they will suffer loss. If the decree in question here be sustained, the estate will have to bear the costs of this suit, and pay a dividend on the interest accruing since the date of the attachment: *Re Savin*, L. R. 7 Ch. 760. He also cited *Rolfe* v. *Flower*, S. R. 1 P. C. 27; *Ex parte Geller*, 2 Madd. 262; *Robson* on Bankruptcy, 2nd ed., 297-298; *Lee* on Bankruptcy, 268.

W. Mulock for the respondent. There is a clear distinction in the Insolvent Act between ranking and proving:

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

secs. 82, 84, 99. The language of the decree merely gives the respondent the right to prove on the estate, so that he may be in a position to make application to the Insolvent Court for whatever relief his rights may entitle him to. If a creditor was entitled to be placed on the dividend sheet as soon as his claim was proved, the decree could not be supported, but such is not the case. The law contended for by the appellant only applies where there is a deficiency, but if there is a surplus we would be entitled to a lien for interest and costs. He cited *Re Hurst*, 31 U. C. R. 116; *Re Langstaffe*, 2 Gr. 165.

June 17, 1879. MOSS, C. J. A.—The amount at stake in this appeal is probably trifling, but the principle involved is of some general importance. A mortgagee holding security upon the land of an insolvent has obtained against the assignee the usual decree for sale with the special direction that in case of deficiency the plaintiff shall be at liberty to prove against the estate for such deficiency on such deficiency being certified to by the Master. It is only against this part of the decree that the appeal is directed. It is obvious that the practical effect of this order is to entitle the plaintiff to prove for interest accruing since the date of the insolvency, and the costs of the suit, including those of a sale through the medium of the Court, if and so far as these are not realized from the property. If the sale should produce less than the mortgage debt as it stood at the date of the attachment, the decree authorizes him to prove for the amount of that deficiency, for subsequent interest, and for costs. If the land should realize an amount exactly equal to the mortgage debt, as it then stood, the decree authorizes proof for the amount of subsequent interest and for costs. If a still larger sum should be produced, the deficiency for which authority to prove is given, would still be composed of subsequent interest and costs, or of costs alone. I am inclined to think that these considerations alone are decisive of the present appeal. Subsequent interest is only

provable, in the extremely rare case of the estate producing a surplus. Subsequent costs are never admissible to proof. I cannot conceive upon what principle the Court of Chancery can be deemed to possess jurisdiction to make provable claims, which according to the established rules in insolvency are unprovable.

The scheme which the Legislature has framed for dealing with the rights of secured creditors on the one side, and the rights of the general body of creditors on the other, is perfectly intelligible. The combined effect of sections 84 and 106 is to entitle the secured creditor to assume any one of three positions. He may stand outside the insolvency proceedings, and realize upon his security in any manner the general law authorizes; whether after realization he can prove, is a question which we are not now in a position to consider. He may release his security, and prove in the Insolvent Court for the full amount of his claim as an unsecured creditor. He may come into the insolvency proceedings and value his security, and then whether the estate takes it at the valuation and ten per cent. additional, or permits him to retain it, he may prove for the excess of his claim beyond the valuation.

Here the plaintiff has taken the first position, and in my judgment he must rest content with the relief which he can obtain within the forum he has selected.

It was, however, ingeniously argued by Mr. Mulock that the proper construction of the decree is, that the plaintiff's right to seek to prove in insolvency for the deficiency is reserved, and that no more is done than to give him leave to apply to the Insolvent Court for such relief as he may be entitled to notwithstanding his proceeding in Chancery. I do not think that we can accede to that argument. Such a reservation would have been idle and useless, for the Court could never have supposed that its decree would fetter the action of an independent tribunal.

It is proper to refer to the judgment in *Re Hurst*, 31 U. C. R. 116, which may seem to enunciate principles antagonistic

to the views I have expressed. That decision, which was not unanimous, was given upon the provisions of the Act of 1864. It would be unprofitable now to examine whether it was warranted by that enactment, and it is sufficient for me to say that it is not, in my opinion, an authority in cases arising under the present Act.

The appeal must be allowed; and although from the smallness of the amount which is probably involved, I should have been glad to relieve the plaintiff from the penalty of costs, I can see no solid ground upon which that course could be adopted. The defendant's duty to the creditors required him to resist the decree. It would have been useless to speak to the minutes, for the decree as drawn up is in conformity with the judgment pronounced by the Vice-Chancellor, and the expense of a rehearing would not have materially differed from that occasioned by this appeal.

PATTERSON, J. A.—The defendant founds his objection against the order appealed from upon the provisions of the Insolvent Act of 1875, particularly section 84.

That section contains the enactment that "if a creditor holds security from the insolvent or from his estate, or if there be more than one insolvent liable as partners, and the creditor hold security from, or the liability of one of them as security for a debt of the firm, he shall specify the nature and amount of such security or liability in his claim, and shall therein on his oath put a specified value thereon; and the assignee, under the authority of the creditors, may either consent to the right to rank for such liability, or to the retention of the property or effects constituting such security or on which it attaches by the creditor, at such specified value, or he may require from such creditor an assignment of such liability, or an assignment and delivery of such security, property or effects, at an advance of ten per cent. upon such specified value to be paid by him out of the estate so soon as he has realized such security, in which he shall be bound to the exercise

of ordinary diligence, and in either of such cases the difference between the value at which the liability or security is retained or assumed, and the amount of the claim of such creditor, shall be the amount for which he shall rank or vote as aforesaid."

Section 85 imposes some restrictions upon the creditor's right to retain a security upon real estate or shipping when there are either prior or subsequent charges upon the same property; and section 86 specifies how the consent of the creditors to the retention of the security shall be obtained.

These sections are, in the division of the statute, headed "Dividends." Then in the division headed "Procedure generally," we have, in section 106, another provision, viz., that "a creditor holding a mortgage hypothec, lien, privilege, or collateral security on the estate of a debtor, or on the estate of a third party for whom the debtor is only secondarily liable, may release or deliver up such security to the assignee, or he shall, by his affidavit for the issue of a writ of attachment, or by an affidavit filed with the assignee at any time before the declaration of a final dividend, set a value upon such security; and from the time he shall have so released or delivered up such security, or shall have furnished such affidavit, the debt to which such security applied shall be considered as an unsecured debt of the estate, or as being secured only to the extent of the value set upon such security; and the creditor may rank as, and exercise all the rights of an ordinary creditor for the amount of his claim, or to the extent only of any balance thereof above and beyond the value set upon such security, as the case may be."

This enactment originated in the Act of 1875. The Act of 1864 had a provision relating to Lower Canada (in sec. 11, sub-sec. 7) not exactly like this one, but *in pari materia*, but that was dropped in the Act of 1869. In both of the earlier Acts, the rights of secured creditors were dealt with in substance, though not in all details, in the same way as in sections 84, 85, and 86 of the present Act.*

*Act of 1864, sec. 5, sub.-sec. 5: Act of 1869, secs. 60, 61, 62.

This section 106 may, at first sight, seem not entirely consistent with sec. 84. It adds the right which was not in terms given before, to release the security and prove for the whole debt as unsecured; and it is apparently intended to enable the creditor to prove as unsecured whatever amount of his debt is not covered by the value he puts upon his security, without reference to the right given to the assignee on behalf or by the direction of the creditors to require an assignment of the security at that valuation *plus* ten per cent.

There does not, however, appear to be any difficulty in reading them together; and, so read, the effect is, that a creditor holding security from the insolvent may, (1) release his security and prove for his whole debt as unsecured; or, (2) value his security and prove for the whole debt less that valuation, as unsecured.

In the latter alternative it matters not whether the assignee assumes the security or consents to its retention by the creditor. In either event, the valuation amount is deducted from the debt, and the balance is what alone is provable.

The plaintiff, in the case before us, has adopted a third course. He has elected himself to realize his security with the aid of the machinery of the Court of Chancery, without giving the assignee or the creditors the option of assuming it at his valuation; and he claims, nevertheless, to prove for what remains unpaid of the mortgage debt, after applying upon the debt so much of the proceeds of the sale as shall remain, after first paying thereout the costs of his Chancery proceedings, and of the sale of the land. The costs of suit alone are stated in the decree as $82.93.

It is quite clear that to allow the defendant what he asks would be not only unauthorized by the letter and the spirit of the Insolvent Act, but would be throwing a burden upon the estate.

If we assume that the land will sell for its value, and that if the plaintiff had proceeded under the Act he would have valued it at the same amount, which we have a right

to assume, the estate would have received the benefit of that sum as a credit upon the plaintiff's debt, whether the assignee assumed the land or not, instead of the reduced amount which would now be credited.

The express provisions of the statute, both in section 84 and section 106, confine the right to rank in respect of a secured claim, to the amount ascertained as pointed out in those sections, viz., by releasing the security or by valuing it.

Indeed it was not contended on the part of the respondent that he could rank under any other circumstances. The contention was, that the decree did not assume to settle the amount for which he should *rank*, but merely enabled him to file formal proofs for the unpaid balance, leaving the right to rank on the dividend sheet to be settled by the procedure under the Insolvent Act.

I do not so understand the language of the decree. The words used are "prove against the estate," and they are evidently intended to convey the right to stand as a creditor of the estate—in other words, to rank—for the amount. In any other sense they would be merely idle words.

In the case *Re Hurst*, 31 U. C. R. 116, a question somewhat similar to that involved in this appeal came before the Court of Queen's Bench. My brother Morrison, who was then a member of the Court of Queen's Bench, held that under the effect of sub-section 5 of section 5 of the Act of 1864, a secured creditor, who had realized his security by selling under a power of sale, was precluded from proving against the estate for the unpaid balance of his debt. I entirely agree with his reasoning and with the conclusion at which he arrived. The majoritv of the Court of Queen's Bench took a different view, holding that the mere fact of selling did not necessarily exclude the creditor from proof, but that the securities might, notwithstanding the sale, be valued, and that if the estate had not been prejudiced or if it were recompensed for any loss, the creditor might still be allowed to prove.

That case was decided in 1871, although the question arose under the Act of 1864.

It may be that one object of the Legislature in adding section 106 of the Act of 1875 to the provisions of the former statutes was to correct the construction so given to the law, and which proceeded, as it strikes me upon a misconception of the scheme of our Insolvent Acts.

But whether the decision in *Re Hurst* was a correct or a mistaken application of the law, it dealt merely with the procedure in insolvency; and, in according to the Insolvent Court the right to entertain the claim, and the power to inquire whether the secured creditor could, without disturbing the equality or abridging the rights intended for all the creditors, be permitted to prove, and to settle the amount, it by no means went the length necessary to support the present decree which removes the inquiry from its appropriate tribunal, and remits it to the Insolvent Court as *rem adjudicatam*.

I think we are bound to allow the appeal, with costs.

BURTON, J. A.—I entirely agree with the judgments just pronounced, and in the reasons on which they are founded.

As I understand the rule in insolvency, all debts that are due at the time of the issuing of the writ of attachment or the execution of the deed of assignment have the right to rank upon the estate, but if the debt is not actually payable as well as due, a rebate of interest must be made so as to place all creditors upon an equal footing.

If the debt is payable with interest, interest may be computed and proved as part of the debt up to the same date.

It may happen that the security held by the creditor is of so little value that it may be to his interest to abandon it altogether and rank as an unsecured creditor. I apprehend that a secured creditor could always without the aid of the statute waive any privilege he had, and come in and prove with the other creditors, but this is at all events set at rest by the 106th section of the Insolvent Act of 1875

which enables him to deliver up the security to the estate, and thereupon to rank as and exercise all the rights of an ordinary creditor for the full amount of his claim, or he may place a value upon his security and rank for the difference.

The Act provides a safeguard against an unfair valuation by giving to the assignee the right of taking the property at an advance of ten per cent., but this does not affect the right of the creditor to prove for the difference between his own valuation and the actual debt sought to be proved.

The provable debt therefore, in such a case, is the actual debt due at the time of the insolvency, minus the sum at which the creditor values his security.

If the assignee were compelled to act upon the portion of the decree which is appealed against, the effect would be that the proof would include, and might possibly be composed entirely of the interest accrued subsequently to the insolvency and the costs of the Chancery proceedings. If the sum realized should be sufficient, and sufficient only to discharge the principal due at the date of the insolvency, it is manifest that the proof would in reality consist only of the subsequent interest and costs.

It is not necessary to consider whether a creditor holding security, makes his election and thereby debars himself from proving for the residue of his original debt by realizing his security through the aid of the Court of Chancery or otherwise; it is sufficient for the present decision to hold that he cannot prove for subsequent interest and costs of the proceedings taken for such realization.

Mr. Mulock was driven to contend that all that the decree provided for was, the right to prove as distinguishable from ranking on the estate for dividends, and he suggested that in the possible case of the estate being sufficient to pay in full and leave a surplus, this interest would be properly payable out of the estate. There can, it is true, be no surplus for the insolvent until the creditors have received principal and interest in full, and the claim to the principal being established as a debt provable at

the date of the insolvency, the ascertainment of interest (subject of course to the question whether the debts are by law entitled to carry interest) is a mere matter of computation; but that is a very different thing from proving interest as a claim in the first instance—interest for the purpose of proof stops at the insolvency—but the debt established by proof at the time of the insolvency, may carry interest, and if the estate is sufficient, it must be applied to its discharge; but that is a very different thing from admitting this interest to proof as a substantive claim.

The meaning of the decree is obviously that the plaintiff shall be entitled to rank for the deficiency, which is in effect allowing him to rank for the costs of the Chancery proceedings, all incurred since the date of the execution of the deed of assignment, and the interest also subsequently accrued, in competition with creditors who are restricted to proving the actual debt due at the time of the insolvency, and are not allowed interest except in the contingency I have referred to.

Such a course would be contrary to the whole spirit of the insolvency law, and ought not to be allowed.

I agree, therefore, that the appeal should be allowed.

MORRISON, J. A., concurred.

Appeal allowed.

BANK OF TORONTO V. NIXON ET AL.

Partnership—Dissolution—Registration under 33 Vic. ch. 20.

T. N. trading in copartnership with J. B. N. under the style of T. N. & Son, retired from the firm, which had been registered in accordance with the Registration Act of 1869, 33 Vic. ch. 20, under an agreement that J. W. should succeed him; that the style of the new partnership which was to be composed of J. B. N. and W., should be N. & Co., and that the new firm should assume all the liabilities of the old to its creditors; but no declaration of this change was filed. Subsequently a note was signed by J. B. N. in the name of T. N. & Son, and accepted by the plaintiffs, who knew that the firm of T. N. & Son had been dissolved, in renewal of certain notes made before the retirement of T. N.

Held, in the Queen's Bench, 43 U. C. R. 447, that there was merely a change in the membership and alteration in the name of the partnership, which should have been registered under the statute, and that T. N. therefore was liable.

Held, in the Court of Appeal, reversing this judgment, that the evidence shewed an entire dissolution to which 33 Vic. ch. 20, did not apply, and that T. N. was therefore not liable.

THIS was an appeal from a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the defendants and enter it for the plaintiffs, reported 43 U. C. R. 447. The facts are stated there, and in the judgment on this appeal.

The case was argued on the 21st May, 1879 (*a*).

Bethune, Q. C., for the appellants. The statute 33 Vic. ch. 20, O., relating to trade partnerships was intended to prevent creditors being misled when the name or style of a partnership was changed, the partners being the same; or where though the name was not changed some of the members retired or new ones were introduced; but it did not apply to the entire dissolution of a firm, which the evidence shews took place in this case. That this is the effect of the statute is apparent from the amendment to it in 1873, by 36 Vic. ch. 23, O., sec, 4, making provision for the registration of a dissolution of a partnership. But even if the dissolution should have been registered, the plaintiffs

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(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

having had actual notice of it, and that a new firm, "Nixon & Co.," of which the appellant was not a member, had been formed, they had therefore notice that James B. Nixon, had no authority to bind the appellant by using the name of a partnership then no longer in existence. The Ontario Legislature had no power to pass such an Act, inasmuch as it relates to a matter of trade and commerce, a subject which is within the exclusive jurisdiction of the Parliament of the Dominion: *Osborn* v. *United States Bank*, 9 Wheat. 739; *Brown* v. *State of Maryland*, 12 Wheat. 445; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Beard* v. *Steele*, 34 U. C. R. 43.

C. W. R. Biggar, for the respondent. There is no conflict of authority here between the Local and Dominion Parliaments. The Legislature of Ontario has not attempted by this Act to affect "Trade and Commerce" in any way; it has merely dealt with "Civil Rights" in the Province: *Cassidy* v. *Henry*, 31 U. C. R. 345; *Smith* v. *Maryland*, 18 How 71; *Story* on the United States Constitution, 1096, 1097. The evidence does not shew a dissolution of the partnership within the meaning of the statute; and registration of the substitution of James Walsh, and the subsequent change of name, was necessary to prevent the appellant being sued for paper made in the name of Thomas Nixon & Son, if not for the penalty. He cited *Rex* v. *Loxdale*, 1 Burr. 145; *Ellston* v. *Deacon*, L. R. 2 C. P. 20; *Smith* v. *Winter*, 4 M. & W. 454; *Bryce* v. *Davidson*, 25 U. C. R. 371; *Lewis* v. *Riley*, L. R. 1 Q. B. 1; *Robinson* v. *Taylor*, 4 Penn. 243.

27th June, 1879. MOSS, C. J. A.—The learned Judge, by whom the case was tried, held that the proper conclusion to be drawn from the evidence is, that at the time the bank took from James Brown Nixon the promissory note in question, they had notice that the firm of Thomas Nixon & Son, by whom the note purported to be made, had been dissolved two years previously, and that there was then no such firm in existence as that of Thomas Nixon & Son.

He, therefore, thought that the sole question was, whether, under the Acts relating to the registration of co-partnerships, the plaintiffs could recover, notwithstanding their notice of the fact of dissolution, because there had been no registration of that fact. The Court of Queen's Bench also expressly held it to be quite clear upon the evidence, that unless the plaintiffs' contention based upon the statutes is correct, the defendant Thomas Nixon is not liable in this action. It was, however, argued before us that the true result of the evidence is to shew that there was no dissolution, or no actual notice of dissolution to the plaintiffs.

We think that the conclusion of the learned Judge, supported as it is by the view of the Court of Queen's Bench, cannot be disturbed.

It was indeed peculiarly a question for decision by the tribunal of first instance, and there is abundant evidence to warrant the finding. It is pressed upon us that the gentleman who was at that time the plaintiffs' cashier, swore that he was unaware that the firm was dissolved. I apprehend that the fair interpretation of his evidence is, that he did not know of any formal dissolution, for he says that the business was continued by another firm composed of James B. Nixon and James Walsh, under the name of Nixon & Co., and that Thomas Nixon went to and remained in Manitoba in the employment of the Government, and so far as he knew ceased to take any part in the business. The evidence of the defendant is express and positive that the cashier not only had notice of the intended dissolution, but acted as the defendants' adviser in the matter.

But the Court was of opinion that the defendant Thomas Nixon not having filed a declaration of the altered state of circumstances, cannot be deemed to have ceased to be a partner, and that the firm being thus still in existence so far as this liability is concerned, the defendant James Brown Nixon, had authority to make the note sued on in this action. This judgment is founded upon the position that what occurred was a change or alteration in the member-

ship of the partnership, and a change or alteration in the partnership name. In this view I am unable to concur. I agree with Mr. Justice Gwynne that there was a dissolution of the firm of Thomas Nixon & Son, and not a mere change in the membership or name. The original partnership consisted of Thomas Nixon and James Brown Nixon. The agreement was, that Thomas Nixon should retire: that James Walsh should succeed him: that the style of the partnership, composed of James Brown Nixon and Walsh, should be Nixon & Co., and that the new firm was to assume the liability of the old to its creditors, who were only two in number. With the greatest respect for those who have formed a contrary opinion, I cannot but think that this was a perfectly clear case of a dissolution of a co-partnership. If that view be correct, I apprehend that there can be little difficulty in arriving at the conclusion that the failure to register a declaration did not make Thomas Nixon liable upon this note. Indeed, if I read the judgment aright, the Court would probably have been of that opinion, if it had taken the view that there was a dissolution. I do not think that there is any room for doubt that the statute of 1869 (33 Vic. ch. 20, O.) does not assume to provide for the case of the entire dissolution of a firm.

Indeed, the object which the Legislature had immediately in view, did not point to the registration of a dissolution. From the terms of the preamble and the scope of the enactment, I gather that object to have been the removal of difficulties, which persons having claims against a firm bearing a certain designation experienced in ascertaining the correct names and addresses of all whom they were entitled to hold as members, and the protection of creditors from being prejudiced or misled by a change in the membership while the name remained unaltered, or by a change in the name without any alteration in the *personnel*. To attain this end it required the registration of a declaration giving various particulars upon the formation of a firm, and of a similar declaration upon any change or alteration

taking "place in the membership of such partnership, or in the name, style, or firm under which they intend to carry on business, and place of residence of each member of said firm." The 7th section provides that, until a new declaration shall have been made and filed by any person who signed the original declaration, or by his co-partners or any of them, no such signer shall be deemed to have ceased to be a partner, and that such new declaration shall state such alteration in the partnership. This does not deal with the case of the total dissolution of an old firm and the formation of a new one, but is confined to the case of a mere alteration in a continuing partnership, such as I have already indicated. Any ground for feeling doubt that this is the true construction of the Act seems to me to be removed by the statute of 1873, (36 Vic. ch. 23, O.) which expressly enables a partner upon dissolution to sign and file a declaration certifying that fact, and impliedly declares that there was no previous provision for registration in such a case.

I am, therefore, of opinion that the statute does not aid the plaintiffs' case, and that the appeal must be allowed; but as the Court below intimated that if they had formed a similar view they would have made absolute that part of the plaintiffs' rule which seeks to strike out the name of James Brown Dixon, who has suffered judgment to go by default, and to enter a nonsuit, we ought to adopt that course, and the certificate may be drawn in these terms.

MORRISON, J. A.—I am also of opinion that this appeal should be allowed. The 7th section of 33 Vic. ch. 20, is by no means clearly expressed, but it sufficiently appears that what the Legislature intended was, that in the event of a change or alteration in the membership of a registered partnership by the retirement of any of the signers of the declaration filed, that such retiring signer should not be deemed to have ceased to be a partner until a new declaration should have been made and filed, stating the change or alteration in the membership of the co-partnership, as

required by the latter part of the 3rd section. No provision was made for the registration of what I may here call a total dissolution of any registered partnership, as all that the Legislature intended providing for was a means by which any person suing a trading firm might ascertain the names of the persons. &c., who composed the firm, and further, to inform parties dealing with such a registered firm when a partner retired from it, and that the remaining partners, either by themselves or with the addition of others, continued carrying on the business of such firm; and in such a case, if such retiring member did not file a new declaration or see that his co-partners did so, stating the change in the *personnel* of the firm, that such retiring partner should not (as the statute expresses it) be deemed to have ceased to be a partner; the object of the act being first to compel the registration of the names of the partners comprising a trading firm, and in the event of a change in such registered firm, the filing of a new declaration stating the change. In either case, non-compliance with the provisions of the statute subjected the parties to a penalty; and in the event of non-registration after a registered member retired, the statute superadded that such retiring member would nevertheless remain liable as a member of the continuing firm.

No provision was made, as I have said, in that Act for the making and the registration of a declaration of a total dissolution of a registered partnership. It is true that the retiring of 'a member of a firm would operate in law as a dissolution of the partnership, but among commercial men the retirement of a member of a firm, or the addition of a new member, is not considered a complete dissolution of the firm, and we may fairly assume that the framers of the Act had in view that state of things, and so provided for the registration of a new declaration when such an alteration or change took place, and to estop a retiring partner from setting up that he ceased to be a partner, if he omitted to file such a declaration.

By the 36 Vic. ch. 23, the Act of 33 Vic. was amended,

and by the 4th section it provides that in the event of a dissolution of any partnership, any, or all of the partners, may sign and register a declaration certifying the dissolution.

This section is only permissive, and no doubt was intended to enable a registered firm or any members of it upon its dissolution to notify the public that their registered partnership was at an end, if in fact it was dissolved, but nothing more. In the case before us the partnership of Messrs. Nixon & Son was put an end to, and as the learned Judge who tried the cause found that at the time the plaintiffs took the note from the defendant James they were aware that the partnership had been dissolved two years previously, after such dissolution either of these defendants was at liberty to enter into partnership with any other person. James Nixon forming a partnership with Walsh under the style of Nixon & Co., cannot, in my opinion, be said to be a change or alteration of the previously dissolved firm of Thomas Nixon & Son, composed of these defendants.

It could hardly be contended that if, after the dissolution of Thomas Nixon & Son, the defendant James had not entered into a new partnership the defendant Thomas would be liable on the note now sued on. If so, I cannot see in what way James entering into partnership with Walsh created or rendered the defendant Thomas liable.

I think the appeal should be allowed.

BURTON and PATTERSON, JJ.A., concurred.

Appeal allowed.

BOSWELL V. THE CORPORATION OF THE TOWNSHIP OF YARMOUTH.

Highway—Right to deviate from—Non-repair.

A bridge built by the township of Yarmouth over Kettle Creek, which crosses an original allowance for road, having become unsafe, and being only required by a few people as the most convenient access to the neighbouring town of St. Thomas, the Council removed it, and in place of this route repaired another road leading to that place, which was very little longer. The bridge had been constructed obliquely across the road allowance, so as to cross the stream at right angles, and in order to reach the west end of it conveniently the road was widened by taking in a small piece of adjoining land, which was always used as part of the road with the consent of the owner, E. After the removal of the bridge it was impossible, owing to the height of the bank, to reach the water on the line of the road, and E. made a new road, running in a southerly direction over his property, from the brow of the bank to the creek, and formed by cutting part of the bank away, by which people continued to descend to the river where it was fordable, but the use of which the Council had never recognized. In driving down this roadway, which was narrow and steep, the wheels ot the carriage in which the plaintiffs, B. and his wife, were driving caught in two pieces of timber used as a support for the roadway next the river, and B.'s wife was thrown down the declivity and injured. The plaintiffs had passed the place on the day previous and were aware of its character, and of the removal of the bridge. The accident did not happen in the deviation from the original road allowance taken in as road for access to the bridge, though in turning off the road to go to the creek they passed over that place.

Held, affirming the judgment of the Queen's Bench, that the defendants were not liable, as they were not bound to keep the road on which the accident happened in repair.

Held, also, that while the bridge was used their liability for non-repair was not confined to the original road allowance, but extended to the deviation used in its place as an approach.

Held, also, that the doctrine that where a highway is found to be so obstructed as to be dangerous, a traveller may go *extra viam* passing as near the original road as possible, was not applicable under the circumstances, so as to make defendants liable.

Held, also, that there was no duty cast on the defendants, as regarded the plaintiffs, to put up a notice warning people not to use the road down the bank, for the plaintiffs knew the place, and must have perceived that it was not a road opened up by defendants.

Coggswell v. *The Inhabitants of Lexington*, 4 Cush. 307, and *Ireland* v. *Oswego*. 13 Kernan 532, distinguished.

Appeal from the Court of Queen's Bench.

This was an action brought against the Corporation of the Township of Yarmouth, to recover damages for injury sustained by the plantiff, Charlotte Boswell, by being thrown out of a carriage in which she was driving with her husband across Kettle Creek, between the 9th concession and the lots south of the Edgeware road, in the

township of Yarmouth, and for damages claimed by her husband as incident thereto. The case was tried before Patterson, J. A., at the Autumn Assizes, at St. Thomas, on the 23rd October, 1878, without a jury, when a verdict was entered for defendants. The facts are fully stated in his judgment.

PATTERSON, J. A.—The first count is, for injury to Mrs. Boswell, alleged to have been caused by a carriage in which she was riding upsetting and falling over an embankment; which accident is alleged to have been caused by the highway across Kettle Creek, between the 9th concession and the lots south of the Edgeware road, being out of repair.

The second count charges that the same highway was composed of a bridge across Kettle Creek and certain embankments and approaches to the bridge, which the defendants had constructed; and that it was their duty to have used proper skill and care in the construction of the bridge and embankments, and to have placed guards or railings along the side thereof; that the defendants neglected this their duty, and in lieu of the bridge made a new road and embankment leading to the creek and across it, which new road or embankment they neglected to guard or fence; and for want of such railing or guard the accident happened.

The third count is, for damages claimed by the husband.

I allowed a fourth count to be added, which sets out that by reason of the absence of the bridge it was necessary to turn aside from the highway, which is described as in the other counts, in order to cross the creek; and that in so turning aside the accident happened.

Kettle Creek crosses the original allowance for road, which is the highway in question. A bridge had been built across the creek, principally by money appropriated by the township, and partly by the aid of parties interested in having it. That was in 1861. In the early part of 1876 the bridge had become unsafe; and the township council after careful consideration of the matter, and after

obtaining estimates of the cost of a new bridge, decided not to re-build the bridge. The bridge was not required by any large number of people. The only persons living near it to whom it afforded a more convenient way to St. Thomas, which is the nearest town and market, than what was afforded by other roads, were Mr. Esterbrook, and one or at most two others. Mr. Esterbrook's house is on the west side of the creek and a short distance from it. He has access to St. Thomas by going westerly along the same allowance for road. The distance to the town is but little more by the westerly route than by crossing the creek and going east. The chief convenience of the bridge to Mr. Esterbrook was from the circumstance that his land lies on both sides of the creek. As long as the bridge had been used, the westerly road was nearly, if not altogether, unimproved from its natural state. In deciding not to restore the bridge, the council on 7th August, 1876, passed a resolution "That the reeve be authorized to put in repair that portion of the road between Daniel Esterbrook's farm and the west town line, instead of re-building the bridge to the east thereof." The work thus authorized was done. The old bridge was removed and some of the timbers were used in the work on the westerly road.

The plaintiffs had been on a visit at Mr. Esterbrook's; and it was when leaving his house and on their way to the railway station at St. Thomas to take the train for Toronto, where they resided, that the accident happened.

Kettle Creek, which is a river of considerable width, is fordable in the line of the highway in question; but the bank is so high and so precipitous where the creek crosses the road, that it is impossible to drive on the line of the road to the water. The water is reached, a little to the south of the road, by turning from the road just at the brow of the bank and going down a very steep road which has been partly formed by cutting a portion of the bank away. This road is so narrow as only to give room necessary for a waggon, and requires very careful driving to avoid danger. When the plaintiffs were there

there were two pieces of timber which had been in the pier of the old bridge, and were turned so as to support part of this narrow roadway on the side next the river; at the other side was the bank out of which the roadway was cut. In driving down this steep and narrow way, the plaintiff Frederick Boswell, who was driving, had his *right* side next the bank. Mrs. Boswell sat on his left. The timbers projected above the ground. It was impossible to drive down the roadway without the wheels at the left side of the carriage passing very close to these timbers. Mr. Boswell not seeing them from where he sat, one wheel passed over one of these timbers and got caught between the two, causing the carriage to upset, and throwing Mrs. Boswell down the declivity. There was no negligence or want of skill in the driving.

When the bridge was first built it was placed obliquely across the allowance for road for the purpose of making it cross the stream at right angles. This mode of placing it made it inconvenient to get on the west end of the bridge without widening the road at that place; and accordingly the fence on the south side of the road had been turned a little to the south, throwing into the road a small piece of land which was used as a road, with the consent of the owner of the soil. The fence continues diverted as it was when the bridge was there. If the true line of the road allowance were produced without following the deflection of the fence, it would strike the spot where the wheel of the carriage went over the log. Therefore the horse and nearly all of the carriage were off the road allowance when the accident happened. It did not happen on the place taken in as the road for access to the bridge, though in turning off the road to go down to the creek they passed over that place.

The plaintiffs were strangers in the locality. They had on the day before the accident, passed the place in going to and returning from St. Thomas, and knew of its dangerous character; but they did not know the other way to the town, though Mr. Esterbrook, their host, knew it.

I see no ground for charging the defendants with any duty with respect to the narrow road down which the plaintiffs were driving. It is stated that a little of the work done in making it passable as a passage to the water was done by the pathmaster by statute labour; but there was no authority for so doing. Whatever work was done in that way, was not, in my opinion, statute labour, although the work so done may have been so much diverted from the roads where it should have been applied. It is, therefore, difficult to see upon what ground the plaintiff's action can even plausibly be supported. It never became a highway within the statutory definition.

It is not charged that there was any neglect of duty otherwise than in failing to provide a bridge. I am unable to say that it was necessary for the ordinary public travel of the locality that there should be a bridge. I think the council acted in good faith, and with an honest intention and endeavour to do their duty, when they decided to substitute the westerly road, which up to that time had been impracticable, and had not in fact existed as a highway, though it was one in law, for the easterly one over the creek; and I perceive no good reason for differing from the conclusion they arrived at. It has not been shewn that the resources of the township could have been more judiciously employed in restoring the bridge than in improving the westerly road; and even if it would be proper for me to oppose my judgment to that of the council, I have not been furnished with data on which to found a judgment. I do not know either the extent of the resources, or the calls upon them. The position taken is, that it was the duty of the municipality to have a bridge there, and I do not think that duty results from the facts in evidence.

I thought at the close of the plaintiffs' case that probably an argument might be urged to the effect that the highway being impracticable by reason of the creek, they were forced to make the detour as the only way to pass the obstruction; and that the accident which happened while they were off the road for that purpose, was therefore

caused by the defect in the highway. The added count seems to have been framed on the same idea. But if such a position were at all tenable it could only be so because the defect arose from neglect of duty on the part of the defendants; and so the question is only another form of that which would arise if the accident had been on the highway. Besides this it would probably have to appear that it was necessary to pass the obstacle. In this case there would be no difficulty in holding that the plaintiffs thought it was necessary, as they knew no other way to the station. But it was not really necessary, and the defendants had removed the necessity by providing another way.

I have therefore to enter a verdict for the defendants.

The plaintiff, Mrs. Boswell, undoubtedly suffered serious injury, and she or she and her husband incurred a good deal of expense in consequence of it.

If the plaintiffs are held entitled to recover, I assess the damages on the whole declaration at $500.

During Michaelmas Term, November, 1878, *Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict obtained in this cause should not be set aside, and a verdict entered for the plaintiffs for $500, pursuant to the Common Law Procedure Act, and on leave reserved. And for leave to add a count to the declaration charging the defendants with negligence in not closing the highway when the bridge became unfit for use or was abandoned and removed, or in not giving notice in some way that the said highway was abandoned and not intended or unfit for use at and beyond the point at which it was necessary to turn aside in order to reach or cross Kettle Creek.

During Hilary Term, *D. B. Read*, Q. C., and *McMahon*, Q.C., shewed cause.

Robinson, Q.C., contra.

The arguments were substantially the same as those urged on the appeal.

HAGARTY, C. J. Q. B.—This case was tried at St. Thomas, before Patterson, J.A., without a jury. The pleadings and facts are stated in the judgment of the learned Judge, who reserved his finding.

We have examined all the evidence, and we consider the learned Judge has fully and fairly stated its bearings and effect. We agree with him that no case of negligence was made out against the defendants for not replacing the bridge which was finally removed in 1876.

It was shewn that only Mr. Esterbrook and one or possibly two other persons had any special use for this bridge, and the defendants improved another road into the town, very little longer, for such persons' use. There could be no reason for any question being raised as to their having exercised a fair discretion in the matter.

After the removal of the bridge these few persons continued to descend from the river bank by a narrow and precipitous road or track to the river, which was fordable. This track partly turned into the adjoining land off the old allowance. It was always a dangerous place—a load could not be taken up it. The plaintiffs knew from experience of the day before both that there was no bridge, and secondly that it was a difficult spot, requiring much care, especially unless the horse was very quiet. They approached it by daylight and tried to descend to ford the stream. I am bound to consider this case as a judge both of fact and law. If I had been on a jury trying this action I should certainly have found for the defendants on the broad ground of the merits.

I do not think a case was made out to make the township liable, unless we are to make them as it were insurers of the safety of every person using every place that can be called a road. I could not say that under all the circumstances there was an unreasonable want of care in the maintenance and repair of such a place as this. When it was determined not to replace the bridge I cannot hold that there was actionable negligence in not continuing to repair the approach.

It was suggested on the argument that the defendant should have stopped up or fenced off the approach to the river, or put up some notice; but here there was no trap left open or invitation implied to any one to use the road. The accident did not happen to persons who unwittingly descended the road expecting to find a bridge to cross by. The plaintiffs knew what it was, and chose to risk driving down this scrambling descent to the river bank. The facts known to the plaintiffs would speak as plainly to him as he approached as if there had been a printed board put up stating that the bridge had been removed, and the road no longer used as an approach thereto. I agree with the learned Judge that the evidence of Esterbrook and another witness as to statute labour being done to this piece of road after the bridge was gone, was wholly insufficient by itself to charge the defendants.

I do not rest my decision on the ground chiefly relied on by the learned Judge, viz., that the spot where the accident happened was off the line. I agree in the verdict found for the defendants on the general merits of the case, as I would have found as a juror.

Speaking for myself, I think that municipal corporations have often been too hardly and strictly dealt with as to the repair of roads. It is impossible for them so to perform their duties as to repairs and fences, &c., as to meet all the demands from time to time on them for every conceivable accident in every spot of highway throughout their jurisdiction. I think, on the whole case as laid before us, the verdict for defendants should not be disturbed.

CAMERON, J., concurred in the judgment of Hagarty, C.J.

ARMOUR, J.—I think the road where the injury complained of occurred must, as against these defendants, be held to be a road which they were bound to keep in repair. There are numberless places in this Province where public highways deflect upon the property of

private individuals by reason of some natural obstruction upon the true allowance for road, and although such deflections may not have become highway as against the owners of the soil, yet it would be impossible to hold them not to be highways as against the municipality in which they exist.

In the case in band there was a public highway upon the site of the original allowance for road upon each side of the river, and in order to use this public highway it was necessary that the deflection should be made upon which the injury complained of happened. This deflection was used by the public as a highway to the knowledge of the defendants, and they, by their conduct in not closing it, and by their holding it out, as it were, to the public as a highway, must be held responsible for the keeping of it in repair. The learned Judge who tried the cause has not found the important fact whether this road was "kept in repair" by the defendants, and I think there ought to be a new trial to determine this fact. If, however, I am forced to find on the evidence before us whether the road in question was kept in repair by the defendants, I find that they did not keep it in repair, but neglected their duty in that behalf, and I am of opinion that the verdict ought to be entered for the plaintiffs for $500, the amount assessed by the learned Judge. There was not the slightest evidence of contributory negligence in my opinion, and the learned Judge has found in effect that there was none.

Rule absolute.

The plaintiffs appealed.

The case was argued on the 21st May, 1879. (*a*)

C. Robinson, Q. C., for the appellants. The learned Judge who tried this case is mistaken in saying the acci-

(*a*) *Present.*—Moss, C. J. A., Burton and Morrison, JJ. A., and Osler, J.

dent did not happen in "the place taken in as road for access to the bridge," as the evidence shews, and it is opposed to his finding that if the line "of the road allowance were produced without following the deflection of the fence, it would strike the spot where the wheel of the carriage went over the log." The law is clear that when a corporation deviate from the original allowance, they are bound to keep it in repair. Their liability to repair cannot be limited to the original allowance. Admitting that the defendants exercised a reasonable discretion in deciding not to rebuild the bridge, it was their duty to close up the highway in the manner prescribed by the Act. They had no power to do so by resolution. The fact that Esterbrook knew that the council did not intend to keep open this road, cannot prejudice the plaintiffs who did not know it. But not having closed up the road, they should have shewn in some way, by fencing it across or by putting up a notice, where it ended. He cited *Hayden* v. *Attleborough*, 7 Gray 339; *Coggswell* v. *Lexington*, 4 Cush. 307; *Ireland* v. *Oswego*, 13 Kernan, 532; *Shearman* and *Redfield* on Negligence, 3rd ed., 391, 415.

D. B. Read, Q. C., and *MacMahon*, Q. C., for the respondents. The evidence clearly shews that the particular spot on which the accident happened had never been taken in as highway; and the learned Judge has so found. Having regard to the nature and small amount of travel on the road leading east over Kettle Creek, and the great amount which would have required to be expended to build a bridge, and keep it and the road in repair, it was not the duty of the defendants to rebuild the bridge and to keep the road in repair, nor would the defendants have been justified in such an expensive undertaking: *Regina* v. *Township of McGillivray*, 38 U. C. R. 91; *Caswell* v. *St. Mary's Plank Road Co.*, 28 U.C. R. 254; *Castor* v. *Uxbridge*, 39 U. C. R. 122. Moreover, the defendants had made and opened another public road or highway in lieu of the said road, which was then in good repair, as the plaintiffs knew, and which they could have used, and thereby

have avoided the accident. The defendants had given all the notice required that the highway had been abandoned, and was not fit for use, by removing the bridge which crossed Kettle Creek, and by opening up another public road or highway to the westward, for the use of the public. The plaintiffs had travelled over the road, and had passed the place of the accident the day previous, and knew that it was not open as a public highway, but that the bridge had been removed, and that the place was very dangerous, and there was contributory negligence on their part in attempting to drive over the road at the place where the accident happened. This case is distinguishable from *Hayden* v. *Attleborough*, as the defect there was immediately inside the travelled highway. They referred to *Regina* v. *Hornsea*, 1 Dears. C. C. R. 291; *Regina* v. *St. Paul*, 2 M. & R. 307; *Regina* v. *Landulph*, 1 M. & R. 393; *Campbell* v. *Race*, 7 Cush. 411; *Taylor* v, *Whitehead*, 2 Doug. 749; *Dawes* v. *Hawkins*, 8 C. B. N. S. 848.

May 27, 1879. Moss, C. J. A., after stating the facts.—The only question of fact about which there is any dispute, is whether the precise spot at which the accident occurred is within the limits of the deviation from the original road allowance, which had been used by the public in driving to the bridge. The finding of the learned Judge, who had the advantage of viewing the *locus in quo*, accompanied by the counsel and the surveyor, is express that " it did not happen in the place taken in as road for access to the bridge, though in turning off the road to go down to the creek they passed over that place." This manifestly means that they had passed over and got outside of the recognized deviation before the carriage was upset. Perhaps it would have seemed more exact if the form of the enquiry had been whether the log which obstructed the wheel, and caused the accident, was within the deviation, but that was really the point to which attention was directed. It was urged that this was a mistake or an inadvertent statement, and that it is inconsistent

with the previous finding, that if the true line of the road allowance were produced without following the deflection of the fence it would strike the spot where the wheel of the carriage went over the log, and that "therefore the horse and nearly all of the carriage were off the road allowance where the accident happened." The statements are not necessarily irreconcilable, for it may be that after leaving the ground that had been actually used in the deviation, the winding character of the route brought them towards the original allowance.

A careful examination of the evidence led me to think that the plaintiffs had failed to establish affirmatively that the spot was either in the original allowance, or in the deviation that had formerly been used in obtaining access to the bridge. As it was confessedly difficult upon the notes of the evidence to arrive with reasonable certainty at a conclusion upon this disputed point we were requested by counsel to refer to the learned Judge, and we have been informed by him that it did not happen within the deviation. In that view it does not occur to me that there is any principle of law, to which the plaintiffs can resort for aid, unless they were bound, as Mr. Robinson argued, to put up some conspicuous notice warning travellers not to attempt to go down the precipitous road leading to the creek. When the declaration is examined, I think that there is no count upon which the plaintiffs can, on this state of facts, succeed. The first count charges that the defendants suffered a public road or highway across Kettle Creek to be out of repair and unsafe, and that Mrs. Boswell was lawfully travelling over this public road or highway, and the said public road or highway being out of repair caused the carriage to upset and fall over a high embankment. The second count, as epitomized by the learned Judge in his judgment, charges that the same highway was composed of a bridge across Kettle Creek and certain embankments and approaches to the bridge which the defendants had constructed, and that it was their duty to have used proper

skill and care in the construction of the bridge embankments, and to have placed guards or railings along the side thereof: that the defendants neglected this duty, and in lieu of the bridge made a new road and embankment leading to the creek and across it, which new road or embankment they neglected to guard or fence. And for want of such railing or guard the accident happened.

The second count is easily disposed of. It is not true that the defendants made a new road or embankment leading to the creek and across it. This new road was made by the owner of the land without the sanction of the corporation. The count is evidently framed in the expectation that the plaintiffs could prove that by the performance of statute labour upon it, or in some other way, the defendants had made this path a public highway. I concur in the view that the evidence wholly failed to establish any such proposition. As to the first count, the finding upon the evidence negatives the material averment that the plaintiffs were travelling over a public road, which the defendants were bound to keep in repair. The accident occurred on private property, the use of which by the public as a deflection from the road they had never recognized. It is, however, broadly argued for the defendants, that their obligation to repair, and their liability for non-repair, were always limited to the road allowance, and never extended to the land which had for so many years been used by universal consent as a part of the highway. In this view I cannot concur. While the bridge was in existence, I think they were bound to keep in repair what was actually used as an approach. They could not shelter themselves under the excuse that the traveller was not on the road laid out upon paper, when he had suffered loss from proceeding upon the highway which was actually and necessarily used by the public. In my opinion their obligations with regard to such a deviation, while in use, were co-extensive with their obligations with respect to an opened road allowance. This seems to me to be in accordance with reason, to be recommended by considerations

of general convenience, and to be confirmed by decisions of high authority in the Courts of the United States.

At the trial the learned Judge permitted a count to be added, charging that the defendants suffered the public road to be out of repair, without any sufficient bridge or other means of crossing the creek : that where the creek crossed the road, it was unsafe to cross the creek, whereby it became necessary for travellers to turn aside for the purpose of crossing the creek at a safe place: that the plaintiffs did for that purpose turn aside from the road with their carriage and horse; and although they exercised due caution, the carriage in turning aside upset and caused the accident. Under this count it is sought to fix the defendants with liability, upon an application or extension of the principle that where a highway is found by a traveller to be obstructed so as to be dangerous, he may go *extra viam*, passing as near the original way as possible. This doctrine was discussed in the judgment in *Carrick* v. *Johnston*, 26 U. C. R. 65, although it did not become necessary to define its precise limits.

I think this doctrine was intended to apply to cases where the traveller's progress is suddenly arrested by an unforeseen and unexpected obstruction, which makes the road impassable or dangerous.

It does not authorize him, where there is a well known obstacle to passage, deliberately to proceed until he comes near it and then select any route over any neighbouring land that may appear to him to be convenient. Still less does it extend to making the municipality liable for any accident that may occur to him while taking such a course. That liability is wholly the creation of legislation. The old case of *Russell* v. *Devon*, 2 T. R. 667, shows that, at common law, no action will lie against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair.

The recent cases of *Young* v. *Davis*, 2 H. & C. 197, and *Parsons* v. *Mathew*, L. R. 3 C. P. 56, recognize the same principle. Now the statute makes the corporation re-

sponsible for all damages sustained by any person by reason of default in keeping a public road in repair. But the want of repair must be, not the remote, but the proximate cause of the mischief. It seems to me that if a person knowing of the existence of an impassable obstacle to travel on the high road, such as the removal of this bridge occasioned, instead of enquiring for some other mode of reaching his destination, chooses to take that road as far as he can safely proceed, and then to deviate over adjoining land, he does so at his own risk. Any injury he may sustain is not caused directly by the non-repair of the highway. Such default is not the proximate cause of the damage. Without amplifying this subject, I content myself with referring to some passages from the judgment of the Supreme Court of Massachusets, in *Tisdale* v. *Norton*, 8 Metc. 392, which indeed go further than is necessary for the purpose of this case. The learned Judge who delivered the opinion of the Court, said: "Now as it seems to us in case one voluntarily leaves the highway, because it has become dangerous or impassable by reason of want of repair, and enters upon other lands without the limits of the highway, he has no right to recur to the town for remuneration for an injury occurring to him on the new passage way of his own selection. * * Wherever, therefore, the road is notoriously a dangerous one, and unsafe for travelling, it becomes the duty of the traveller, upon being apprised of the actual state of things, whether this be indicated by a bar thrown across the road, or other equally effective mode of giving notice, to abandon the route and make use of some other public way; otherwise he proceeds at his own peril."

It remains to notice Mr. Robinson's contention that the defendants are responsible, because they did not put up any notice warning the public not to use the road down the bank to the creek. This was rested upon the general principle that when, from some cause beyond the control of the corporation, there is danger in travelling upon the highway, reasonable care should be taken, by notice or otherwise, to guard or give warning to the public.

The learned counsel referred us to cases in the United States, of which it will be sufficient to notice two, that upon examination seem to lend most support to this position.

In *Coggswell* v. *The Inhabitants of Lexington*, 4 Cush. 307, the plaintiff was injured by his wagon coming into contact with a post, which was near the true line of the highway and within the limits of the general course and direction of the travel, and where travellers were accustomed to pass. There was nothing which reasonably indicated or gave notice to a traveller that the post was not within the way intended for public travel. It was held that it was no less the duty of the defendants to guard travellers from injury by the post on the roadside, than to guard them from falling over precipices, or into pits near the line of the road, or from being thrown into the water from a bridge; and that if they could not lawfully remove the post, it was their duty to place such a fence or other barrier between it and the road, as would have rendered the road safe.

In *Ireland* v. *Oswego*, 13 Kernan, 532, Denio, C. J., laid it down as law, that where a road is so constructed or altered as to present at one part two paths, both of which exhibit the appearance of having been used by travellers, and one of them leads to a dangerous precipice, while the other is quite safe, it is the duty of those having charge of the road to indicate in a manner not to be mistaken by day or by night, that the unsafe path is to be avoided; and if it cannot be otherwise done, to put up such an obstruction as will turn the traveller from the wrong track.

I do not think that the plaintiffs bring themselves within the scope of this doctrine, even when most widely expressed. The facts patent to their observation were as significant to all reasonable persons as the most conspicuous notice could have been. They had travelled over this road the day before; they saw that the bridge was not there, and I have no doubt that they knew it had been intentionally removed; they saw the nature of the pathway

leading down the bank to the creek, and I think they must have perceived that it was not a road opened up by the township. As the witnesses said, it was not beaten like an ordinary road: it looked like a farmer's lane. The defendants could, at most, have placed up some sign-post, for they had no right to put any obstruction on Mr. Esterbrook's land, which would prevent him from passing over his property; and it is not easy to suggest any inscription which could have added to the information which the plaintiffs already possessed of the possible perils of the way.

I think that the appeal should be dismissed, with costs.

OSLER J.—It may be admitted that if the defendants had left the bridge across Kettle Creek it would have been their duty to keep it, as well as the approach to it over the acquired road, as I will call the original deviation, in good repair, and that if the plaintiff had sustained the injury she now complains of, in endeavouring to reach the bridge, she would have had a good cause of action. But I think very different considerations are involved, when it appears that the defendants, in the exercise of their discretion, had actually removed the bridge. It is true that this was done in pursuance of a resolution only, and that the defendants could perhaps only answer an indictment for not keeping up the bridge, by shwing a bye-law passed in the manner required by the Municipal Act. So long as the bridge stood there was, as it were, an invitation to the public to use it, and in doing so to use the acquired road, which had become a part of the highway, in order to reach it. But when the bridge was removed by the defendants, and they had determined not to rebuild it, there was, in my opinion, as plain an intimation to the public that there was no crossing over the river at that place for which the defendants held themselves responsible, as if they had put up a notice, "No thoroughfare here." If the plaintiff then chose to ford the river, that was a mode of crossing for which the defendants never provided the approach, and I think

she must be taken to have assumed the risk of an accident happening in attempting to cross the river in that manner.

But further, it appears upon the whole evidence, and a reference to the learned Judge who tried this case without a jury, and who viewed the *locus in quo* in the presence of the counsel for the parties, confirms the impression, that the accident happened not within the acquired road which had been used for the purpose of gaining access to the bridge, but at a point rather to the south of that, where the plaintiffs turned in order to arrive at the spot where the river was fordable.

Whatever may be said as to the liability of the defendants to keep in repair the original deviation, or acquired road, while it could be made use of in order to reach their bridge, I do not see on what ground it can be successfully contended that their liability extends to the repair of a deviation made use of by the plaintiff for the purpose, not of crossing the bridge, but of fording the river, and at a place which the defendants never assumed or kept up as a highway. To my mind it would be as reasonable to hold them responsible for the loss of the plaintiff's life, if she had been drowned in crossing the stream, as for the accident here in question.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

SHAW V. CRAWFORD ET AL.

Lunatic's estate—Final order of foreclosure—Committee—Security.

Held, affirming the decree of SPRAGGE, C., following *Gunn* v. *Doble*, 15 Gr. 655, and *McLean* v. *Grant*, 20 Gr. 76, that a sale in 1854 by a mortgagee who had obtained a final order of foreclosure of real estate of a lunatic, valid on its face, could not be questioned by reason of a prior formal defect discovered a number of years afterwards.

The committee of the lunatic filed a bill for redemption against the mortgagee, the representatives of the purchaser from him under a final order of foreclosure, and H., the committee, who executed the mortgage, alleging that the mortgage was executed before H. had given security. The objection to the security was that the attestation clause of the recognizance filed by H. was not signed by any Judge of the Court. It appeared, however, that the affidavits of justification were duly sworn, and each page of the mortgage was authenticated by the signature of the Chancellor.

Held, that 9 Vic. ch. 10, which provided for security being given, was only intended to apply to cases where the committee was appointed by the Master, and not, as here, by the Court, who have a discretionary power to authorize a committee to act before giving security.

Held, also, that the security was only against the misapplication of the personalty, and was not directed against a mortgage executed under the authority of the Court.

Held, also, that the requirements of the statute as to security were only directory, and that a failure to comply therewith would not invalidate acts done by a person who had been actually appointed.

THIS was an appeal from a decree pronounced by the Chancellor, dismissing the plaintiffs' bill without reception of evidence, other than the various orders of the Court and the proceedings in the suit of *The Trust and Loan Co.* v. *Shaw*, and other documents which were put in as exhibits by the defendants.

The pleadings and facts are stated in the judgment.

The case was argued on March 6th, 1879 (*a*).

Blake, Q. C., and *H. Cameron*, Q. C., (with them *A. C. Galt*,) for the appellants. The Chancellor was wrong in holding that Crawford was not bound to look behind the final order of foreclosure, as it was clearly his duty to see that the proceedings warranted such final order, and that the lunatic was properly represented. The cases referred to in the reasons against the appeal, *Gunn* v.

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

Doble, 15 Gr. 655, and *McLean* v. *Grant*, 20 Gr. 76, to establish the contrary, have no application, as they were decided on the ground that no notice was given of the infirmities in the title, and followed the Irish cases, which do not really furnish authority, as in those cases there was an order of foreclosure and then a judicial sale, not a private sale as in this case. The policy of the Court should be to favour a sale as against a foreclosure. It is shewn that the committee of the lunatic had ample means to have demanded a sale but failed to do so. The only power under which Harman could execute the mortgage was that conferred by the statute 9 Vic. ch. 10, the terms of which must be strictly followed, but he failed to comply with the condition requiring him to give security, and until such security was given in the manner provided in the statute, he had no power to meddle with the estate, and the mortgage is therefore absolutely void: *Colclough* v. *Bolger*, 4 Dow 54; *Carew* v. *Johnston*, 2 Sch. & Lef., 280; *Story's* Equity Jurisprudence, 6th ed., ss. 190, 1531; *Taylor* on Evidence, 5th ed. sec. 1682, Rule 6th; *Gore* v. *Stacpoole*, 1 Dow 18; *Edwards* v. *Edwards*, L. R. 2 Ch. D. 291; 43 Geo. III. ch. 75, Imp. Stat.; 2 Vic. ch. 11, sec. 10; 9 Vic. ch. 10; Consol. Stat. U. C. ch. 12, sec. 31, *et seq.*; 28 Vic. ch. 17, sec. 11; R. S. O. ch. 40, sec. 66, *et seq.*

Bethune, Q. C., and *Crombie*, for the respondents, the Crawfords. It is submitted that the purchaser Crawford was justified in relying on the final order of foreclosure and decree in the suit of *The Trust and Loan Co.* v. *Shaw*, which were perfectly regular; *Gunn* v. *Doble*, 15 Gr. 655; *McLean* v. *Grant*, 20 Gr. 76. At any rate, after the lapse of time that has now occurred, and the recognition by the Court of Chancery of the respondent Harman for so long a period of time as committee of the estate of the lunatic, the maxim *omnia præsumuntur rite esse acta* applies, and an irrebuttable presumption arises that Harman was regularly appointed Committee, and that the mortgage, the proceedings authorizing the same, the final order of foreclosure, and all proceedings upon which

it was obtained, were valid and regular: *Burke* v. *Crosbie*, 1 B. & B. 503. The provision in the statute as to security was directory only and not of a nature the non-compliance with which would vitiate all the subsequent proceedings. The statute does not say that the person shall not be a committee if the security be not furnished: *Rex* v. *Patteson*, 4 B. & A. 9; *Re Lincoln Election*, 2 App. R. 324; *Maxwell* on Statutes 343. The proceedings in the suit of *The Trust & Loan Co.* v. *Shaw* having been duly enrolled, such enrolment must be vacated before any proceedings can be taken to open the foreclosure decreed in the suit: *Pickett* v. *Loggon*, 5 Ves. 702. Moreover, there is not a single allegation in the bill which charges fraud, and without proof of actual fraud the decree cannot be set aside: *Patch* v. *Ward*, L. R. 3 Ch. 206. They cited *Arkell* v. *Wilson*, 5 Gr. 470, 7 Gr. 270; *Earl of Buckinghamshire* v. *Drury*, 2 Eden 68; *Bennett* v. *Hamill*, 2 Sch. & Lef. 572; *Dickey* v. *Heron*, 1 Chy. Ch. 149; *Brooke* v. *Lord Mostyn*, 33 Beav. 457, 458, 458, 2 DeG. J. & S. 373, L. R. 4 H. L. 304; *Blackie* v. *Clarke*, 15 Beav. 605; *Dart*, vol. 2, 871, 5th ed.: *Sugden* on Vendors, 760, 14th ed.

C. Moss, (*Marsh* with him,) for the respondents, The Trust and Loan Company. The length of time during which Harman acted as committee justifies the presumption that a perfectly satisfactory security was given which cannot be found. In making the advance upon the security of the mortgage made by Harman, The Trust and Loan Company were not bound to look behind the order of the Court authorizing the mortgage. If necessary to enquire as to the security having been given, it would be equally incumbent on purchasers to enquire into every other detail and to review the decision of the Judge as to the necessity for a sale or mortgage. The only two things which a purchaser is bound to ascertain are whether the Court had jurisdiction to order the sale, and has it done so having all the proper parties before it. It is against public policy that this Court should look behind the order authorizing the mortgage, or behind the final order of foreclosure in

such a case as the present, since the value of all property sold under a decree of the Court would be ruinously depreciated if, after a great lapse of time, where there is no fraud or collusion on the part of the purchaser, the title to property so sold could be shaken : *Burke* v. *Crosbie*, 1 B. & B. 503. The case of *Patch* v. *Ward* is a complete answer to the appellant's contention that the Court should not support foreclosure proceedings as strongly as those for sale. The company is not charged with any omission in having obtained a foreclosure instead of a sale, nor does the bill state that a sale was asked; it only refers to the absence of any security from Harman; but if it were asked, it must be assumed that the Court satisfied itself that a foreclosure was the proper course. It was not suggested at the hearing that further evidence could be given than what was shewn by the papers to prove actual notice. The Trust and Loan Company are not necessary parties to the bill; no relief is asked against them, and the allegation that the Crawfords have relief against them is not sufficient to bring them before the Court. They cited *Ex parte Grimstone*, Amb. 706; *Beverley's Case* 4 Co. 126, 127; *Re Burrough*, 2 Dr. & W. 207; *Re Rutter*, 22 L. J. N. S. Chy. 178; *Bennett* v. *Hamill*, 2 Sch. & Lef. 577; *Dickey* v. *Heron*, 1 Chy. 150; *Bowen* v. *Evans*, 1 J. & L. 178, 2 H. L. C. 257; *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334; *Baker* v. *Sowter*, 16 Beav. 343; *Blackie* v. *Clark*, 15 Beav. 606; *Lloyd* v. *Johnes*, 9 Ves. 65; *Curtis* v. *Price*, 12 Ves. 105; *Thompson* v. *Tolmie*, 2 Peters, 167; *Burke* v. *Crosbie*, 1 B. & B. 503; *Chisholm* v. *Sheldon*, 1 Gr. 294; *People* v. *Allen*, 6 Wend. 487; *Jackson* v. *Young*, 5 Cowan 268; *Regina* v. *Inhabitants of St. Gregory*, 2 A. & E. 99, *Pearse* v. *Morris*, 2 A. & E. 96.

Geo. Harman, for the respondent S. B. Harman, submitted that the bill should be dismissed, as no relief at the hearing was asked against him, nor was he called upon to answer the charges made in the bill. Moreover, he took no part at the hearing, and the bill was not dismissed at his request.

June 17th, 1879. Moss, C. J. A., delivered the judgment of the Court.

Upon the argument it appeared to us to be quite clear that the defendants Harman and The Trust and Loan Company were entitled to succeed, for reasons which I shall presently state; but we entertained some doubt whether the dismissal of the bill as against the representatives of Mr. Crawford was not premature, and we therefore took time to consider the case. In order to explain the views which we have taken it will be necessary to give a concise summary of the pleadings and the proceedings at the hearing. The bill is filed in the name of George Shaw, a person of unsound mind, by Alexander Shaw, his committee, and Alexander Shaw, as plaintiffs against the representatives of the late Mr. John Crawford, Mr. Harman, and The Trust and Loan Company of Canada.

The material allegations of the bill appear to be as follows:

In March, 1840, while still of sound mind, George Shaw mortgaged in fee to Georgina Huson, park lot No. 23 in the 1st concession from the bay, with the exception of 10½ acres, being a parcel of lands within the limits of this city, and the west half of lot No. 28 in the 2nd concession from the bay, in the township of York, to secure £500 and interest. Upon the marriage of Miss Huson and Mr. Harman the mortgage was settled upon trustees, but the settlement was not registered, nor any notice given of its existence. In September, 1850, George Shaw was proved by inquisition to have been insane for some time, and he is still an inmate of the Provincial Lunatic Asylum. Upon the petition of his wife an order was made on the 27th of September, 1850, with the usual reference to the Master to enquire and certify as to a proper person to be appointed committee of the person and estate. The Master having reported, an order was made by the Court granting the care and custody of the person of the lunatic to his wife, and the care and management of his estate to William Wakefield, with a direction in these words: "He first

giving such security, to be approved of by the Master, for answering the said estate and accounting for the rents, issues and profits thereof once in every year, * * such security to be perfected on or before the 20th day of June, now next, and in the meantime, and until such security shall have been so perfected, the said William Wakefield is not to interfere in any manner in the affairs and concerns of the said lunatic as committee of his estate or otherwise." Wakefield not having perfected the security, an order was made rescinding his appointment, and granting the management of the estate to William B. Crew. This order contained a precisely similar direction with reference to the giving of security. Under this order it was settled by the Master that the security should be the recognizance of two sureties in the sum of £380 each, and of Crew himself in the same sum. Crew did not succeed in obtaining the requisite security, and the result was that on the 14th of March, 1854, another order was made, which —after reciting a petition of Mrs. Shaw setting forth the various orders and the report, and praying that the management of the estate might be committed to Harman, he first giving security similar in form and amount to that which was approved by the Master to be given by Crew, the persons entering into such recognizance to be approved of by a Judge in Chambers—proceeded as follows: "Whereupon, and upon hearing read the said petition, and the solicitor for the heir-at-law and next of kin of the said lunatic appearing and not objecting thereto, the same is ordered accordingly."

The statements up to this point are in the nature of inducement, and their substantial correctness is not disputed. Then follows the gravamen of the complaint.

It is distinctly averred that the security was never given by Harman, nor was any bond entered into by him, nor was any further application or order made in reference to his pretended appointment as committee, and that he consequently did not become, and has not at any time been the committee of the estate.

This averment, it may be noted, is the pivot upon which the plaintiffs' whole case is made to turn, for it is not pretended that there would be any ground for impeaching the mortgage to the Trust and Loan Company, if security had been given in accordance with the terms of the order. It is then alleged that the estate was very valuable, and that the income was sufficient for the purposes of the estate and the proper maintenance of the lunatic and his family; that in October, 1854, a sale of a portion of the estate was held, which produced a large sum of money and securities, which were available for the proper purposes of the estate; that Harman, wrongfully acting under the pretence of being committee, and withholding from the Court the true circumstances of the affairs of the estate, and of the position he occupied in relation thereto, and of his having failed to comply with the order of the Court in regard to his appointment, and the Court being misled into the belief that he had complied with the order and was the duly constituted committee, and there being no person to question his position and oppose any application he made, applied to a Judge for leave to raise money upon a mortgage of property belonging to the estate; that this application was at first refused, but subsequently on the 27th of November, 1854, he again applied for such leave, and thereupon the Court on the 5th of February, 1855, settled a mortgage for £1000 to the Trust and Loan Company; that Harman did by indenture of mortgage, bearing date the 1st of May, 1855, and purporting to be made by George Shaw of the first part, (executed by Harman wrongfully pretending to act as committee and without any special authority from the Court for him to execute the mortgage, and without the knowledge or consent of any person on behalf of Shaw, of all which the Trust and Loan Company had constructive, if not actual notice,) and his wife of the second part, and the company of the third part, Shaw, in consideration of £1000, professed to grant to the company lot No. 23, except the 10½ acres, subject to redemption on payment of £1000 on the 10th of February, 1872, with

interest at 8 per cent per annum, payable half yearly, to which indenture Harman signed the name of Shaw, by him the said Harman; that the Court never gave Harman any authority to execute the mortgage, and that he had no such authority, and that the mortgage was and has always been null and void as against the lunatic and his estate: that the other portions of the lands embraced in the mortgage to Miss Huson, were in pursuance of an order dated the 19th May, 1854, sold in parcels to various purchasers, which order expressly directed Harman to execute to the purchasers conveyances to be settled and approved by a Judge in Chambers.

I interrupt the narrative of the bill here, to observe that the notice which is attributed to the company is of a wrongful pretence by Harman to act as committee, and the absence of special authority from the Court to execute the mortgage. This obviously is pointed to the alleged failure to give security, and to nothing else.

The bill then proceeds to charge that in view of the circumstances of the estate, and its available means, Harman in pretending to give a mortgage upon so large and valuable portion of the estate for so small a loan, acted in a grossly improvident manner, and perpetrated a fraud upon the estate, the value of the mortgaged property being $50,000, and its character being such that it could have been readily subdivided so as not to require the whole to be encumbered by the mortgage.

It is further alleged that at the time of the subsequent sale by the company to Crawford the premises had increased in value far beyond that sum. Various general charges of improvident dealing with the estate, and neglect of its interests, are made against Mr. Harman, which are not now argued to be, and do not appear to us to be, material. Then follows a detailed account of the proceedings in a suit brought by the company for the realization of their security, and the postponement of the mortgage held by the trustees of the marriage settlement, which the company contended should be treated as having been paid

off out of their loan. In this contention the company failed, and by the decree they were directed to redeem the trustees, and upon redemption were entitled to foreclose Shaw, in default of payment of their claim, upon both mortgages. The company having paid off the trustees and obtained an assignment of their mortgage, on the 4th of January, 1868, a final order of foreclosure was made on the 2nd of October, 1868. The charge of notice to the company is repeated in the form that they always had notice of the fact that Harman never had any power or authority vested in him to execute the mortgage, and that it was void *ab initio*, and that the proceedings in foreclosure were invalid and of no efficacy, and that the same might at any time be set aside, inasmuch as the true circumstances attending Harman's appointment, and his subsequent conduct of the estate, were concealed from the Court in such proceedings.

The premises were sold and conveyed by the company to John Crawford on the 9th of February, 1869, for $9,000, and it is alleged that this, although in excess of the company's advances, was far below the real value of the property, and that before and at the time of his purchase Crawford had notice of all the facts previously stated, and the state of the title, and the defects and irregularities connected therewith. The plaintiffs further submitted that even if he had not actual he had constructive notice, and in particular was bound to take notice that the contemplated appointment of Harman as committee had never gone into effect, and that he was not entitled to act for Shaw, or to execute deeds, or otherwise to act on his account, or on account of his estate. Mr. Crawford died in May, 1875, leaving real and personal representatives, who are made defendants. Alexander Shaw was, on the 15th of April, 1875, duly appointed committee of the estate of George Shaw. Finally, it is alleged that the defendants, who are entitled under the will of Crawford, have a remedy over against the Company on covenants contained in the conveyance to him, and that Harman should in any event

be ordered to make compensation for the loss sustained by his conduct in the premises. The prayer is for a declaration that Harman was not the duly appointed committee of the estate, and never has been committee, and had no authority to act on behalf of the estate, or to execute the mortgage to the company, and that the foreclosure proceedings are null and void, and for redemption in the usual form. It asks for no specific relief against the company or Mr. Harman.

By their answer the representatives of Mr. Crawford alleged, upon information and belief, that the security had been given to the satisfaction of one of the Judges; that the proceeds of the loan were received by Mr. Harman, and by him paid into Court to the credit of the matter in lunacy, and applied under the direction of the Court; that their ancestor had no notice, actual or constructive, of the pretended irregularities, but was a *bona fide* purchaser; and that all the documents were registered.

By his answer Mr. Harman set up that he believed, and had always acted under the belief, that security had been given, and approved of by the Master and filed; that he had always acted as such committee under the advice and direction of the solicitor of the estate; and under the orders and directions of the Court, and he acted under the honest belief that he had authority for whatever he did, and that it was for the best interests and benefit of the estate; and that after investigation by the Court of his acts and conduct as such committee, as well as his accounts in reference to the estate, he was released and discharged from the office of such committee, and the plaintiff, Alexander Shaw, was appointed committee in his place.

The company's answer is to the same effect, with the addition of a disclaimer of any interest in the premises, and an allegation that the indenture to Crawford does not contain any covenant upon which they could be liable to their co-defendants, in the event of the plaintiffs' success.

The case came on for examination and hearing before his Lordship, the Chancellor, when, according to the note of

the short-hand reporter, Mr. Bethune, for the representatives of the Crawford estate, raised a preliminary objection to the reception of evidence on the part of the plaintiffs, and referred to the various orders and other documents which now appear as exhibits in the printed case. The counsel for the other defendants raised no such objection, but were content that the plaintiffs should proceed to adduce their testimony. His Lordship dismissed the bill, apparently grounding his judgment on the doctrines enunciated in *Gunn* v. *Doble*, and *McLean* v. *Grant*. He is reported to have observed: "A great deal has been said as to those recognizances. I really am not prepared, without going further into the case, to say whether there has been no recognizance entered into, but the Court dealt with this committee for a long series of years, as having entered into this recognizance; and in regard to any wrong in this particular case, if no recognizance had been entered into the Court would not have increased the recognizance one dollar by reason of the mortgage that was then ordered by the Court. If the parties think that they have a case, the only course is to take it before the Court of Appeal, or to rehearing before this Court, to reverse the cases to which I have referred. I think this case is not distinguishable from the three cases quoted. I think the safest ground is to proceed upon the principle that the final order of foreclosure is an authority for the sale, and that no person can go behind it." In reply to an enquiry by plaintiffs' counsel, as to whether the Court rejected any evidence on the ground that the foreclosure order is conclusive, his Lordship observed that he thought the evidence the plaintiffs were prepared to give would not be admissible in any case.

Before examining the objections taken to this mode of disposing of the case, it will be convenient to refer to such material documents as have not already been sufficiently described. An instrument purporting to be a recognizance is produced from the files of the Court, whereby Mr. Harman, Mr. J. Hillyard Cameron, and Mr. Philip M. VanKoughnet, personally appearing to acknowledge, does each

of them acknowledge himself to owe to Mr. Buell, the Master of the Court, the sum of £380 to be paid to him, and unless they shall do so they are willing and agree that the said sum shall be levied, recovered, and received of them respectively, and from their houses, lands, &c. This is tested in the name of the Chancellor as of the 15th of March, 1854. Then follows a recital of the order appointing Mr. Harman committee, and the condition is, that if he shall duly answer the estate of the lunatic, and account before the Master or one of the Judges for the rents and profits, and pay the balance which shall from time to time be reported due from him as the Court shall direct, and perform his office of committee in all things according to the true intent and meaning of the order of the 14th of March, the recognizance shall be void, but otherwise shall remain in force. It is signed by each of these gentlemen, but not sealed, and there is subjoined the following attestation clause: "Taken and acknowledged by the above mentioned Saml. B. Harman, John Hillyard Cameron, and Philip M. VanKoughnet, at my Chambers in Osgoode Hall, in the City of Toronto, this day of 1854." This was evidently intended to be signed by the Chancellor or one of the Judges, but remains unsigned. There is also an affidavit of justification in the usual form sworn by Mr. Cameron and Mr. VanKoughnet before the Registrar, on the 15th March, 1854, the day on which the recognizance appears to be tested. In the Chamber minute book there is an entry on the 5th of February, 1854: "Re Shaw. Mortgage for £1,000 borrowed from the Trust and Loan Company. Settled. Strong," the last word being the name of the gentleman, who was acting as solicitor for Mr. Harman and the estate. The mortgage, which bears date of the first May, 1855, purports to be made in pursuance of 9 Vic. ch. 10, and recites, with other proceedings in the matter, the order of the 14th of March, whereby Mr. Harman was appointed committee, and an order dated 5th February, 1855, whereby it was, amongst other things, ordered and directed that Harman should be at liberty to

raise, by mortgage of part of the real estate, from the Trust and Loan Company the sum of £1,000, and that he should execute such deed or deeds to the said Trust and Loan Company for securing the same, as should be approved by one of the Judges of the Court in Chambers, and that the said sum should be paid into the Commercial Bank here in the name of the registrar to the credit of the matter of the lunatic, subject to the further order of the Court. It ends with the statement that Mr. Harman, in pursuance of the above recited order, has signed and sealed in the name and on the behalf of Shaw. Each page of the mortgage bears the signature of the Chancellor, who also signed a memorandum that he approved of and allowed the mortgage. The deed from the company to Mr. Crawford is made under the provisions of 25 Vic. ch. 72, and contains no covenants,

On the 7th of February, 1876, an order was made upon the petition of Alexander Shaw, that Mr. Harman, committee of the estate, should forthwith bring in his accounts of such office, and that it should be referred to the Master to take and pass his accounts in the usual manner, and that he should pay into Court any balance that might be found against him; and upon such payment that he should be discharged from his committeeship of the estate.

Upon this state of facts it appears to be clear that as against the Trust and Loan Company the bill was properly dismissed. No evidence can be suggested which could possibly render them proper parties to this record. The relief sought is redemption of the mortgage, and in that proceeding the company have no interest. The only reason assigned for bringing them before the Court is that upon their covenants they were liable over to Crawford. Whether that would have been sufficient ground for involving them in this litigation it is unnecessary now to enquire, because when the conveyance is examined it appears that the existence of any such covenants is wholly imaginary.

We also think that the bill was rightly dismissed as against Mr. Harman. Even if he did not give the requisite security, he was treated by the Court as Committee,

and he has never sought to repudiate that position, or to deny his liability to account in that capacity. It now appears that an order was obtained at the instance of Alexander Shaw providing for the taking of his accounts before the Master. Upon that or a similar order the Court had ample power to recognize his dealings with the estate. To permit the maintenance of this suit against him in view of the circumstances, would, in our judgment, be an abuse of the powers of the Court, which was properly prevented.

The case against the representatives of Mr. Crawford presents considerations of a less simple character. It is probable that the difficulty, if there be any, has arisen from the early stage, and perhaps somewhat informal way, in which their counsel interposed his objection to the plaintiffs' case. It would seem from the statements of the different counsel that there was a good deal of discussion before the learned Chancellor as to the nature of the evidence with which the plaintiffs were prepared, but there is nothing from which we can satisfactorily gather what the limits of this discussion were. Indeed there is nothing strictly before us but the Reporter's note, to which I have already referred, and the report of his Lordship's judgment. It is tolerably manifest, however, from the tenor of the pleading, and the scope of the arguments addressed to us, that the real ground upon which the plaintiffs seek to establish an equity is that the failure to give the prescribed security prevented Mr. Harman from becoming committee, and that the mortgage executed by him and the foreclosure proceedings were consequently invalid, and that notice of this defect is attributable to the company and to Crawford. It is scarcely probable that the plaintiffs hoped to shew that either of these parties had actual notice of any defect or insufficiency in the recognizance. It is to the last degree unlikely that the company would, in that case, have made the advance until the mistake was rectified.

It is urged, however, that the Chancellor proceeded solely

upon the authority of *Gunn* v. *Doble*, 15 Gr. 655, and *McLean* v. *Grant*, 20 Gr. 76, and that these decisions ought not to be followed. The main argument is, that in deciding *Gunn* v. *Doble*, his Lordship relied upon Irish cases, which are not applicable because there the purchase was followed by a judicial sale, and not as here by a private sale. But the learned Judge has not failed to observe this distinction. On the contrary, he expressly says, at p. 662: "If a purchaser at a sale by the Court '*has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and that it has in that investigation properly decreed a sale*,' it does appear to me upon principle that a purchaser from a party in whose favour the Court has decreed final foreclosure, has the like right to presume that the Court has taken the like steps, and has upon investigation properly decreed final foreclosure." In our opinion the rule laid down in *Gunn* v. *Doble*, is reasonable and convenient. To turn into a mortgagee one who purchased on the faith of a foreclosure decree and final order, because many years after his purchase some formal defect was discovered, would be contrary to all equity. To quote again from the language of the Chancellor, at p. 663: "While there would be no wrong in holding a purchaser bound by what appears upon the face of the decree or other order, which may be said to constitute a link in his chain of title, it would be quite another thing to hold him bound to look into that which was not discovered by the Court, which the Court had passed as correct and regular, and upon which the Court had founded its decree or order." But it is correctly urged that this line of decisions only extends to protect purchasers who had no knowledge of the alleged defect.

Assuming, then, that the company and Crawford could be proved to have had notice, or ought to be affected with notice, that the only security given was the document produced from the files of the Court, what is the position of the case? The plaintiffs contend that the completion of

a certain security was a condition precedent to the execution of the mortgage, and that such security never was completed; that Harman never became committee, and had no authority to execute the mortgage. The first view advanced, on behalf of the plaintiffs, was that the completion of the security was a statutory condition, which must be exactly complied with before the Court could authorize the execution of a mortgage; but we are of opinion that this cannot be sustained. The transaction being prior to the consolidation of 1859, we must refer to the provisions of the statute 9 Vic. ch. 10, as originally passed, and not to the provisions of C. S. U. C. ch. 12, which are by no means the same.

The statute 9 Vic. ch. 10, was passed to remove doubts as to the jurisdiction conferred upon the Court of Chancery in this Province in matters relating to lunatics and their estates. It conferred upon the Court the same jurisdiction as was possessed in England by the Lord Chancellor. By the fifth section it was enacted, that "in order to afford due protection to the property of persons found by inquisition to be lunatic, idiot, or of unsound mind, in Upper Canada, and to prevent misapplication of the same, the Master who shall approve of and appoint a committee of the estate, shall also approve of two or more responsible persons, as sureties, in double the amount of the personal estate, and of the annual rents and profits of the real estate, for answering and duly accounting for the same; and the said security should be taken by bond, or by recognizance, in the name of the Registrar of the Court, * * in such manner as the said Master shall direct."

The sixth section made it the duty of every committee to file an inventory under oath, and the seventh section provided that whenever the personal estate was insufficient for the discharge of debts, it should be the duty of the committee to petition for authority to mortgage, lease, or sell, so much of the real estate as should be necessary for the payment of debts, and that one of the Masters of the Court should report upon the petition; and that upon the

coming in of the report, and an examination of the matter if it should appear to the Court that the personal estate was not sufficient, an order should be made, directing the committee to mortgage, lease, or sell, the whole or any part of the realty, and to execute, in stead of the lunatic, the necessary conveyances. The latter section also provided, that in the event of such mortgage, lease, or sale, the Court might require any additional security to be given by the committee for the faithful application of and accounting for the proceeds.

The eleventh section expressly declared that every conveyance, mortgage, lease, and assurance, made under the order or direction of the Court, pursuant to any of the provisions of the Act, should be as valid and effectual, to all intents and purposes, as if the same had been executed by the lunatic when of sound mind.

Now, in the first place it will be observed that the section providing for security, only extends to cases where the committee has been appointed by a Master, and contains no reference to the case of an appointment by the Court, Here the appointment was made by the Court, and the Legislature did not assume to divest it of any discretion in the matter of security, which it already possessed. That discretion was at least as wide as that which had belonged to the Lord High Chancellor or Commissioners. The case of *Re Rutter* 1 W.R. 27, before the Lords Justices, to whom the Court of Appeal Act of 1851 gave the same jurisdiction in matters of lunacy as the Chancellor had, shews that the Court could authorize a committee to act before security was given. Again, the security was only provided for the protection of the estate against the misapplication of the personalty, or the rents and profits of the realty. The fifth section did not contemplate or deal with the case of a mortgage given under the authority of the Court. Lastly, the language of the section is directory to the Master, and the failure to comply with its terms exactly would not invalidate acts done by one who had been appointed.

The section is quite distinguishable from the enactments which have been coustrued to require a strict compliance with conditions before a power to sell arose. For example, where it was enacted that an administrator *upon* giving an approved bond containing certain conditions, should be authorized to sell certain lands, it is easy to understand the principle upon which it was held that his conveyance was ineffectual when he had not given such a bond. The distinct ground in such a case is, that he could not pass the title, because he had not done an act which he was bound to perform before the right to exercise the power could come into existence. So in England it is quite clear that although the committee of the person is fully appointed upon a *fiat* being granted, the committee of the estate is not so until the certificate of the completion of the security has been filed, but this depends upon the terms of the Lunacy Amendment Act of 1857, and the orders of the Court made in pursuance thereof.

But the plaintiffs now mainly rest upon the order for the appointment, which is, that the care and management of the estate should be committed to Mr. Harman, he first giving security in the recognizance of himself in £380, and two sureties in the same sum, who were to be approved of by a Judge in Chambers. It is by no means clear that upon the true legal interpretation of this order, the giving of the security was made a condition precedent. Indeed, the case of the *King* v. *Patteson*, 4 B. & A. 9, seems to be an authority the other way. The question arose upon the construction of a statute, by which it was enacted that high constables should pay moneys received by them in respect of the county rate to such person as the justices should at their Quarter Sessions appoint to be the treasurer, he first giving security in such sums as should be approved by the justices. In delivering the judgment of the Court, Parke, J., speaking of the giving of security, used this language, p. 22: "We think it is not made a condition precedent, either to the enjoyment of the office, or to the liability to account for the moneys received by virtue of the statute. The

statute appears to us in this respect to be directory only; and if so, the appointment of the defendant was complete though such security was not given."

In this case Mr. Harman does not dispute his appointment or liability. On the contrary, he admits both in the most unequivocal manner. We think that the Chancellor was quite right in laying much stress upon the long and unvaried recognition of Mr. Harman by the Court, as committee. It would be indeed a strange thing if after this recognition, after numerous unimpeachable sales had been made by him, as committee, under the authority of the Court, and after he had been expressly ordered at the instance of the estate to account as committee, the contention could now be listened to that he never in fact filled that office, because an objection can now be urged to the form of the recognizance. It would seem still stranger, when we reflect that that recognizance, if completed, would have afforded no security to the plaintiffs against any injury they might sustain in connection with this mortgage transaction. The Court, in authorizing the mortgage, no doubt acted, as the bill suggests, upon the assumption that the prescribed security had been perfected, but it did not deem it necessary to exercise its discretion of requiring further security on account of this loan. Still further, the only objection to this recognizance is, that it is not authenticated by the signature of the Chancellor or any other Judge of the Court. We think that it ought, even in the absence of such signature, to be presumed that it received the Chancellor's approval. It is produced from the files of the Court, it is tested of the 15th of March, 1854, in the name of the Chancellor, and the affidavits of justification were sworn before the Registrar in his Chambers on that day. There was no statute or order of Court requiring any particular mode of marking the approval, and the instrument is even more formal than the ordinary recognizance familiar to Courts of law.

It only remains to notice that the mortgage itself, with its full and precise recitals, received the approval of the

Chancellor, and is authenticated in detail by his signature. We are not prepared to hold that any one dealing with the estate was not thereafter justified in believing that Mr. Harman had authority to execute the mortgage. That view is not in conflict with the principles laid down in such cases as *Brooke* v. *Lord Mostyn*, 33 Beav. 457. It does not assume to trench upon the salutary jurisdiction of the Court to enforce justice where the Court has been intentionally deceived, and made the involuntary instrument of depriving others of their just rights.

In every point of view it appears to us that the plaintiffs' case is hopeless, and that it is our duty to terminate this litigation so far as it is within our power, by dismissing the appeal, with costs.

Appeal dismissed, with costs.

BUTLER V. THE STANDARD FIRE INSURANCE COMPANY.

Insurance—Married woman—Insurable interest of—Representation as to title —Unreasonable condition.

A gift by a married woman to her husband of her separate property, must be established by clear evidence of her intention to destroy the separate use.

Defendants insured the plaintiff, a married woman, for $1000, on a general stock-in-trade of groceries, which had been bequeathed to her for her sole and separate use. After the testator's death, her husband, who was the sole executor of the will, carried on the business in his own name with her acquiescence.

Held, affirming the judgment of SPRAGGE, C., that she had an insurable interest in the goods which the husband clearly held as trustee for her.

When the fire occurred only $667 worth of the original goods remained in specie, but other goods had been purchased in the course of business, and the stock was then really worth $2,800.

Held, that the plaintiff was entitled to recover the full amount of the policy.

The policy was for $1000 on the stock-in-trade, and $100 on shop fixtures, in a building described. One question in the application required the applicant to state the nature of her title, whether fee simple, leasehold, or by bond or agreement, and if others were interested to give names, interest, and value. To this she answered "Fee Simple." *Held*, that the questions did not relate to the title to the goods, and that there was no misrepresentation.

A condition was added by the Company that if the assured should make any misrepresentation or concealment, or omit to make known any fact material to the risk, or make any untrue statement as to ownership or title, the policy should be void—without providing, as in the statutory condition, that such misrepresentation must be material to the risk, and should void the insurance only as to the property affected by it.

Per PATTERSON, J., agreeing with SPRAGGE, C., such condition was unreasonable, and was in effect declared to be so by the statute.

This was an appeal from a decree of Spragge C., reported 26 Gr. 341. The pleadings and facts are fully stated there and in the judgments on this appeal.

The case was argued on the 27th May, 1879 (*a*).

C. Moss for the appellant.

J. A. Boyd, Q. C., for the respondent.

The arguments sufficiently appear in the judgment.

The following authorities were referred to for the appellant: *Harrison* v. *Douglas*, 40 U. C. R. 410; *Irwin* v. *Maughan*, 26 C. P. 455; *Fitch* v. *Rathbun*, 61 N. Y. 579; *Caswell* v. *Hill*, 47 N. H. 411; *Dean* v. *Bailey*, 50 Ill. 481;

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, J J.A.

Blood v. *Baines*, 79 Ill. 437; *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47; *Williams* on Executors, pp. 1372, 1374, 1377, 8th ed.; *Angell* on Insurance, 76.

For the respondent: *Carnegie* v. *Carnegie*, 22 W. R. 595, 783, 30 L. T. N. S. 460, 31 L. T. N. S. 7; *Gicker's Administrators* v. *Martin*. 50 Pa. 158; *Rich* v. *Cockle*, 9 Ves. 369; *Mayer's Appeal*, 77 Pa. 482; *Goulstone* v. *Royal Ins. Co.*, 1 F. & F. 276; *Merritt* v. *Lyon*, 3 Barb. 110; *Sands* v. *The Standard Ins Co.*, 26 Gr. 113.

June 27, 1879. Moss, C. J. A.—There was much learned argument before us upon the effect of the Married Woman's Act upon the position of a wife, who permits her husband to control or dispose of her personal estate; but it does not appear that the solution of the present question requires us to enter into these considerations. I think it will be found that upon the issues raised upon the evidence the plaintiff need not appeal for aid to these statutes. She claims to recover upon a policy, by which the defendants insured her against loss of fire to the extent of $1,000 on general stock-in-trade of groceries, &c., and $100 on shop fixtures, contained in a described building. The grounds on which the defendants resist her demand are: Firstly, that it is a condition of the policy, that if any person shall insure his building or goods, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company in order to enable them to judge of the risk they undertake, such insurance shall be of no force; and that the plaintiff misrepresented material circumstances in representing herself to be the owner of the goods, and that no other persons were interested therein.

Secondly, that it is a condition that the application shall be taken and considered as part of the policy, and if in the application the assured make any erroneous or untrue representation or statement, or omit to make known

to the company any fact material to the risk or make any untrue statement respecting the title or ownership, the policy shall be null and void; and that the plaintiff by the application warranted that she was the owner of the insured goods, and that no others were interested therein, and that the defendants issued the policy upon the faith of such warranty, whereas she was not the owner of the goods, and others were interested therein.

Thirdly, that there is a condition that the company is not liable for the loss of property owned by any other party than the assured, unless the interest of the insured is stated in or upon the policy, and that the goods were owned by other persons than the plaintiff, and the interest of the plaintiff is not stated in or upon the policy.

And, fourthly, that the plaintiff was not at the time of the loss interested in the goods, and sustained no loss.

I now proceed to examine these defences in the light of the evidence. The plaintiff is the sister of one Michael Collins, who died on 11th August, 1877, having made his will, by which he devised and bequeathed to her all his real and personal estate, after payment of debts and funeral and testamentary expenses, for her own sole and separate use absolutely. He appointed sole executor her husband, Charles Butler, who obtained probate and assumed the administration of the estate. The testator had been carrying on the business of a grocer, and was possessed of a stock-in-trade and fixtures. After his death Charles Butler carried on the business, put up his own name over the door, and used the same books of account. There is no evidence of any agreement between him and his wife upon the subject, or even of any express assent upon her part to his assuming that position. She was aware that he was continuing the business in his own name, and using the goods which were hers by bequest, and although she said she supposed he was carrying it on for her, the whole tenor of her evidence is that she simply acquiesced in his so dealing with her property. But there is no ground for the pretence that she had effected a sale to him, or made

any contract in relation to the goods. It is true that in an affidavit which he made for the purpose of proving the claim after loss, he swore that it was agreed that the policy should be held by her as security for the payment of the value of the stock and shop fixtures, but I think it is quite clear that he was simply swearing to what the framer of the affidavit supposed to be the legal effect of the dealings with the business. The whole gist of the transaction was that she supposed the goods to be her own property, and she simply left them there, although she knew that her husband was carrying on business with them. There were about $1,800 worth of goods at the time of the testator's death, and of these only about $667 remained *in specie* when the fire happened. The rest had been sold by her husband, and in the course of business other goods had been purchased so that the whole amount in stock had increased to about $2,800. The debts were all paid by the husband as executor, so that if he had not made additional purchases and carried on the business in the manner I have mentioned the whole beneficial interest in the remaining goods would have clearly belonged to her as legatee. The policy was made on the 2nd of November, 1877, and the fire occurred on the 28th February following.

Now let us consider the plaintiff's rights as a wife independently of the Married Women's Act, and as if no such legislation existed. This is a position which as between her and her husband she is clearly entitled to assume. The established doctrines which would have previously afforded her adequate protection have not been superseded by legislation designed to protect her in cases which these doctrines did not reach. Let us suppose in the first instance that some other person had been executor, and that having paid the debts and other charges, he was prepared to deliver the stock-in-trade and business to the legatee. It would be quite superfluous to cite authority to prove that although the husband would take the legal estate, he would in equity be deemed a trustee for the separate use of the wife. For more than a century that

has been the settled doctrine of Courts of equity. From the application of familiar principles it followed that a gift to him from the wife could only be established by a clear evidence of her deliberate intention to destroy the separate use. This was laid down by Lord Eldon in *Rich* v. *Cockell*, 9 Ves. 369, and has been fully recognized by Vice Chancellor Hall, and in appeal by the Lords Justices, in *Carnegie* v. *Carnegie*, 22 W. R. 585, 783, where it is decided that before the husband can claim by gift he must shew that she knew what her rights were, and deliberately gave them up. The attempt of these defendants to set up a gift to him entirely fails, and he remained her trustee. As trustee he could not profit by his trust, and the business which he carried on was therefore in the eye of a court of equity, and as between her and him, her business. I say as between her and him "her business," because when the rights of creditors intervene, very different considerations arise. I also desire to guard against the supposition that these observations extend to the case of the husband being allowed to employ in his business and family expenditure money which had been received from the produce of separate estate: *Gardner* v. *Gardner*, 1 Giff. 126.

If it be said that the husband was executor, that only seems to enhance the strength of the wife's position. After the payment of the debts and charges she was entitled to receive the residue of the *corpus*, and he could not continue the business with her stock-in-trade except as her trustee.

The misrepresentations set up as grounds for defeating the policy are said to be found in the application. I do not think that that document can be fairly said to contain any misrepresentation. It was filled up by the company's local agent, and the form he used seems to be specially appropriate to insurances upon buildings. Prepared as it was, the defendants cannot complain if it receives a strict, rather than a liberal, construction, wherever the terms leave any room for choice. Now from the beginning to the end

there is not one enquiry that relates to, or one answer that touches upon, the title to the goods. The only questions relating to title are the first and second. The former requires the applicant to state the nature of her title, whether fee simple, leasehold, or by bond or agreement, and if others were interested to "give names, interest and value." The agent, who was made fully cognizant of the true state of circumstances, undertook to write as answer to this demand: "Fee simple." The latter asks what incumbrance, if any, is now on said property, to which the agent wrote the answer: "None." It seems to require some hardihood on the part of the defendants to expect that any Court of justice will hold that this is a representation that she was the absolute owner of the goods, and that no other person was interested therein. Assuming that the equitable interest I have shewn her to have possessed, would not have justified such a representation, still she did not in fact make it. No question was asked, and no statement made, respecting her title to these goods. It would be a monstrous injustice, if the defendants, after issuing their policy with this application before them, and without choosing to make further enquiry, could now maintain that they were not insuring the interest which she really possessed. The application, although it was filled up by the defendants' agent, fairly answered every question put. She withheld no information, which these questions seemed to demand. In short she neither did nor omitted anything that I can perceive entitling the defendants to avoid this policy on the ground of misrepresentation or concealment.

The only remaining question is, whether the plaintiff had an insurable interest. This seems to me to be quite free from doubt. She had at least an equitable interest in these goods, a right which was enforceable by the aid of a Court. This right was so far connected with and dependent for value upon the safety and preservation of the property, that its loss would result in pecuniary damage to her; and when these circumstances co-exist I take it to be beyond dispute that there is an insurable interest.

It does not appear to me, however, that there was any necessity for a reference to the Master to enquire into the amount of damages. The insurable interest and the value of the goods destroyed, each largely exceeded $1,100 and interest. This amount may be easily calculated by the Registrar and inserted in the certificate.

With this variation the decree should be affirmed, with costs.

PATTERSON, J. A.—A perusal of the appeal book in this case leaves a very clear conviction that, whether or not the judgment is fairly open to question upon any ground, it is entirely in accordance with justice.

The loss for which payment is claimed undoubtedly occurred; the defendants, beyond question, covenanted to make good that loss to the plaintiff, and received the full consideration demanded for their undertaking; and there is no room for a pretence of bad faith or unfair dealing on the part of the plaintiff or her husband. A less meritorious defence cannot be discovered among the cases which abound in our reports in which insurance companies of litigious spirit have been the defendants.

The questions really to be decided lie in a narrow compass, although a number have been set out as grounds of appeal, and most of them have been spoken to in argument. In the eleven propositions in which the appellants have formally stated their objections, the points on which they insist have been so fully and carefully brought forward as to indicate, as the most convenient way of disposing of the matter, the consideration of those propositions, without troubling ourselves with a more extended review of the issues originally presented upon the record.

The grounds Nos. 1 and 2 are general propositions only, asserting that the respondent is bound by both the policy and the application as parts of the insurance contract, and may for our present purposes be conceded without discussion.

No. 3 complains that the respondent, in and by her application for the policy, misrepresented and omitted

to communicate the ownership of the insured property, the same being a circumstance material to be made known to the defendants, in order to enable them to judge of the risk they would undertake, by reason whereof it is alleged the policy is void. This is the subject of the second paragraph of the defendants' answer in which is set out the first statutory condition, which it is charged the plaintiff violated. The objection is met shortly and conclusively by the circumstance noted by the Chancellor, that (assuming the fact of the alleged misrepresentation or omission to have been proved) there is no evidence that it was material. It has often been pointed out, in this Court and elsewhere, that materiality to the risk is a question of fact, not of law, and can only be found upon proper evidence. But there is certainly no pretence for the charge of misrepresentation; as the plaintiff did not state and was not asked to state to whom the goods belonged. The only question put respecting the ownership of property related to land. It required the applicant to state the nature of his title, whether fee simple, leasehold, or by bond or agreement, and if others were interested, to give name, interest, and value. The answer "Fee simple," shewed the defendants that the plaintiff had so understood the question. This question, like others in the application paper which were not answered at all, was irrelevant to the transaction.

No. 4, which asserts that there was a breach of warranty in the respondent's statement that she was the owner of the goods and that none others were interested therein, wants the necessary foundation of fact, no such statement having been made.

No. 5 denies that the condition in the policy, set forth in the third paragraph of the answer, is unjust and unreasonable. That is not a statutory condition, but is one added by the company. It provides that if in the application, survey, and diagram the assured make any erroneous or untrue representation or statement, or omit to make known to the company any fact material to the risk, or make any untrue statement respecting the title or ownership, and the

circumstances of the assured, or conceal any mortgage, execution, or other encumbrance, or understate the amounts thereof, on the said property, this policy shall be null and void. Part of this condition covers the same subjects to which the first statutory condition is addressed; but where the latter invalidates the insurance by reason of such misrepresentations or omissions only as are material to the risk, and invalidates it only in regard to the property to which the misrepresentation or omission relates, this added condition makes every erroneous or untrue statement fatal, although the error or mistake may be utterly immaterial; and fatal to the entire policy although it may relate to a small part only of the property insured.

In these particulars the learned Chancellor held that the condition was unjust and unreasonable. I have merely to add that in my judgment the Legislature had, by anticipation, done the same thing, when the qualifying words were inserted in the condition given by the statute. But even if the condition could be held just and reasonable, it has not been broken, as the supposed breach is the statement mentioned in ground No. 4, which turns out to have no real existence.

No. 6 disputes the respondent's insurable interest in the goods. This is a legitimate subject of argument. Nos. 7, 8, and 9 are amplifications of No. 6, and No. 11 is of the same character.

I shall notice these together, disposing in the meantime of No. 10, which relies on the fact that after the fire and before this suit, the plaintiff had assigned her right to the insurance money. This defence was not pleaded. The Chancellor refused leave to amend; and nothing has been brought to our attention to show that the interests of justice or the disposition of the real question in controversy between the parties call for such an amendment.

The compass of the enquiry is thus narrowed to the question of the plaintiff's insurable interest in the goods.

The facts, which are very simple and not involved in any uncertainty, have been already stated, and I shall not stop to repeat them.

The question is, whether the plaintiff had such an interest in the goods insured and destroyed by the fire, as to enable her to recover for the whole loss or for any and what part of it.

The Chancellor having found in the plaintiff's favour for the whole, and the onus being, therefore, on the defendants to impeach that finding, we turn again to the "grounds of appeal" to see upon what the defendants base their claim to reverse his decision.

No. 6 contains a general denial of the insurable interest; and certain specific objections are detailed under the other numbers.

No. 7 puts forward the position which was insisted on by Mr. Moss in his argument, that the executor never assented to the legacy, and the goods therefore never became the property of the plaintiff. If we could adopt the suggestion that the executor had not assented to the legacy, it might be found that the main difficulty in the way of the plaintiff's recovery had disappeared. It cannot be doubted that under the circumstances shewn to us the plaintiff was entitled to the whole of the assets which constituted the stock-in-trade and fixtures of the grocery business, and that the consent of the executor could have been compelled by a Court of equity: *Williams* on Executions, 8th ed., p. 1274. Hence the plaintiff would have an insurable interest in these assets, although the legal ownership might not have vested in her. Then if the case were that the executor, still holding the goods as executor, had without authority, chosen to continue the business, the conclusion would not be hard to reach that the insurable interest of the legatee extended to all the stock-in-trade for the time being: *Williams* on Executors, 8th ed., pp. 1531, 1654. The plaintiff, however, cannot upon the fair result of the evidence avail himself of this line of argument. It must be held, as Mr. Boyd has put it, that, in effecting the policy in his wife's name the executor assented to the legacy, if he had not before done so. But it is plain that he assented to it all along. No explanation can be given

of his dealing as he did with the goods, except that the business belonged to his wife.

No. 8 submits that the plaintiff waived the protection of the statutes in that behalf, and that the goods became the husband's as at common law, because she allowed them to remain in his possession and control, and because with her consent he dealt with them as his own. Any apparent force which this contention possesses is, I think, due to a slight confusion of things which should not be confounded together; while at the same time it overlooks, in common with some of the other objections, the fact that an equitable interest is insurable as well as a legal interest. At common law, or rather apart from statutory rules, the goods would not have become the property of the husband, except as trustee for his wife, as by the terms of the will they were her separate property. The statutes do not prevent her taking any interest she would have taken if they had not been passed. The right of the married woman under the statutes is to enjoy her property free from the debts and obligations of her husband, and from his control or disposition without her consent. Undoubtedly the plaintiff consented to her husband dealing with her stock-in-trade. Whatever was sold would be necessarily gone irrevocably from her as well as from her husband, and this would be so whether he was simply her trustee at common law, or dealing by her consent with property held by her under the statute. But to reason from this result, which affects only the goods which were sold, that some abandonment of ownership or transfer of property takes place between the husband and wife would be, as it strikes me, to confound two things which are distinct from each other. The property in the goods which remain unsold does not change. Neither the power to sell nor the permission to use the property can, on any principle intelligible to me, make it the husband's. The legislation intended for the protection of the married woman would have stopped far short of its object if the wife could not allow her husband to use and enjoy her property on pain of its being confiscated to him

No. 9 asserts that "the facts proved shew that the respondent never treated the said goods as hers," which seems to be at the same time a very true and a very immaterial circumstance; "but," it goes on to say, "on the contrary that they were purchased from her by her husband and were used by him in his business." The only remark I make upon this at the moment, is, that no such purchase is even hinted at by the evidence; and in its absence, the use of the goods by the husband in his business (if the business was his) could not change the property as between him and his wife, whatever rights it might give to his creditors. I do not overlook the affidavits or declarations made by the plaintiff and her husband as part of the proofs of loss, some passages in which have been commented on as containing an admission by the plaintiff that she had sold the stock, &c., to her husband, that he was her debtor for the price, and that the policy was taken in her name as security. It is scarcely necessary to observe that nothing in the nature of estoppel arises from these documents. The evidence simply is that the plaintiff made the one declaration and made use of the other. We now have her statement and that of her husband upon oath, as to what the facts were. If these declarations are inconsistent with the accounts now given, it might be necessary to form an opinion as to how the inconsistency arose, and how far it affected the credibility of the parties as witnesses. I perceive no inconsistency. There is no statement that the goods were sold: that is merely inferred from the parties saying they were not paid for, an expression quite consistent with no sale having taken place. What is said is that she left the goods in the business; that the husband carried on the business; and did not pay her for the goods. When to this we add that these declarations both give this explanation as the reason why the policy was effected in the wife's name; and further disclose the fact that while only $1000 was insured upon the stock, the amount left in the business had been $1800; it would be no forced reading of the documents which would find in them a declara-

tion that the plaintiff was entitled to be paid her $1800 out of the stock insured; a state of facts which would, I apprehend, give her an insurable interest. I am not now speaking of the facts as they appear from all the evidence, but only the effect of these declarations which have been so much relied on for the defendants.

The 11th and last ground of appeal embodies the strongest position of the defendants, contending that in any event the respondent can only recover to the extent of the value of that part of the original stock which was destroyed by the fire, because it is not shewn that the other goods were paid for by money produced by the sale of those which had belonged to the plaintiff.

I am inclined to think there would have been evidence of this for a jury. It does not appear that the husband had any money of his own. He bought either for cash or on 30 days' credit. All the cash paid must apparently have come out of the business, and the inference would not be unreasonable that all the new stock had been so paid for except what was represented by unpaid 30 days' invoices, while even for these debts the remedy of the creditors would be against the goods—that is, the stock generally — even though prosecuted by suit nominally against the husband alone.

I do not entertain any doubt of the plaintiff's right to recover in respect of the fixtures insured for $100, and of such part of the original stock as was lost by the fire This is stated to have exceeded $667. The remaining $333 creates the difficulty. Although from the judgment delivered by the Chancellor his attention might not seem to have been very directly called to the question of insurable interest upon which the case now turns, and the relationship of the parties was discussed by him rather in view of the charge of misrepresentation, I do not gather that the question was by any means overlooked. Upon this point therefore, as well as upon those more fully noticed in his remarks, it is right to give the plaintiff the advantage which a respondent derives from having a

judgment in his favour, the onus of displacing which is assumed by the appellant. The disinclination to disturb the judgment of the Court of first instance, is naturally encouraged by the fact that the amount involved in doubt is small in itself, and but a small proportion of that in controversy.

I confess I have had difficulty in fixing the right of this plaintiff to the $333 on grounds which are entirely satisfactory, and my doubts are not altogether removed. On the other hand, I cannot say with more certainty that the plaintiff had not an insurable interest in the stock to the full amount of $1,000. If we apply the test suggested in the last ground of appeal and enquire whether in fact the money from sales of the plaintiff's original goods went to buy the new stock, I should, as a juryman, say without any hesitation that it did so to an extent beyond the $333. I think the finding would be warranted that at least $1,800 worth of the stock consisted either of the old stock or of new stock bought with the proceeds of it. My doubt is whether this carries to the plaintiff an insurable interest in the new stock. I should cease to hesitate if I could see my way clearly to treat the husband as trustee for his wife, and as therefore dealing with the property of his *cestui que trust.* I cannot, however, fully recognize him in that character. Before our statutes respecting the property of married women there would have been no room for question. The legal estate would have vested in him and equity would have held him to the terms of the bequest to her separate use. But although, by reason of the bequest being to her separate use the plaintiff does not require the protection of our statute law, I take it that the force of the statute is to clothe her with the legal as well as the beneficial ownership; and so the occasion for declaring the husband her trustee no longer exists.

I may recapitulate the considerations which seem to me to bear in favour of the insurable interest of the plaintiff, premising that it is not essential to such interest that

there shall be equitable ownership. On this point I refer to two decisions as instructive : *Hickman* v. *Isaac*, 6 L. T. N. S. 383, which is authority for the doctrine that a mere covenant to insure property creates in the covenantor an insurable interest in it: and *Davies* v. *Home Ins. Co.*, decided in this Court in 1866 (3 E. & A. 269) which affirmed the insurable interest in one who had endorsed notes as surety for the purchase of goods, and whose only interest in the goods was the verbal agreement of the principal debtor that he would sell the goods and hand the proceeds to the endorser to be applied in payment of the notes.

The considerations I refer to are the following:—

The relationship of the parties as husband and wife, and their close community of interest, apart from legal ownership, explains the absence of that definition or distinct assertion of rights to be looked for among people who are dealing at arms' length.

There never was any recognition of separate ownership or interest in the husband as between himself and his wife; although her acquiescence in his using his own name in the business would, as between her and his creditors, have estopped her from denying his title.

The husband is not shewn to have had any means to carry on the business with except those of his wife.

The conviction is unavoidable that the idea of the brother's legacy passing away from the legatee and vesting in her husband never entered the contemplation of the parties.

It is certain that whatever shape their apprehension of their rights might have taken, if in their own minds they had tried to define them, and to whatever extent the specific assets of the testator had been converted in the course of the husband's trading, the legacy was to be traced to and found in the business and nowhere else; the business was the only fund to which the plaintiff could resort. She had not even such a chose in action substituted for it as might have resulted from a contract of sale to her husband.

Her interest in the specific stock on hand was recognized by her husband when he explained the position to the agent of the defendants on the occasion of the application for insurance. The conclusion evidently indicated by this was that he considered her entitled out of the business as it stood to at least as much as she had left in the business at the start; and this is strongly confirmed by the overt acts of effecting the policy in her name and at once informing her of it.

These considerations seem to me to have afforded materials to the plaintiff for asserting against her husband a specific interest in the whole stock-in-trade; and having regard to them, I think it is impossible to say she had not an insurable interest, or that the decision of the Chancellor ought to be disturbed.

I therefore willingly concur in dismissing the appeal.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

IN RE NIAGARA ELECTION.

Dominion Controverted Election Act—Preliminary objection—Appeal.

Held, that an appeal does not lie to this Court from a judgment of the Court of Common Pleas overruling a preliminary objection as to the jurisdiction of the Court to try a controverted election for the Dominion.

After the delivery of judgment in this matter, overruling the respondent's objection to the jurisdiction of the Court of Common Pleas, reported 29 C. P. 261, the respondent served notice of appeal to the Court of Appeal from such judgment, and filed the usual bond, and then gave notice of motion for an order for the immediate hearing of the appeal.

The petitioner objected that no appeal to the Court of Appeal lay, but was willing that the appeal should be expedited if such appeal lay, and it was agreed that this motion should be argued as if a cross-application had been made to quash the appeal.

Hodgins, Q. C., for the appellant. Under sub-sec. 3 of sec. 1, R. S. O. ch. 37, the Court of Common Pleas could have sent this matter direct to the Supreme Court, and although they did not do so, the appellant is entitled to reach that Court through the ordinary avenue. 37 Vic. ch. 10, D., the Dominion Controverted Elections Act, provides that an election petition is to be deemed by the Court in which it is filed as an ordinary cause within its jurisdiction. The decision of the Common Pleas is a judgment of the Court below in the cause, and therefore an appeal lies under R. S. O. ch. 38, sec. 18. The point is not one of procedure, but of pleading, and the objection overruled is equivalent to a demurrer: *Crombie* v. *Jackson*, 34 U. C. R. 575; *King* v. *Cumberland*, 1 B. & C. 64.

Robinson, Q. C., and *H. J. Scott* for the respondent. The judgment in the Common Pleas merely related to a pre-

liminary objection and a question of procedure, and might have been disposed of by a Judge sitting in Chambers, and the decision does not come within the R. S. O. ch. 36, sec. 18, even if an appeal generally lay. Special provision is made by 37 Vic. ch. 10, sec. 11, D., for the disposal of preliminary objections. The Common Pleas is not sitting as the ordinary Court of Common Pleas, but as a Court specially constituted for the trial of election petitions. That no appeal was contemplated to this Court is shewn by this Court being one of the Courts in which petitions can be filed: 37 Vic. ch. 10, sec. 3, sub-sec. 2.

January 16, 1879. Moss, C. J. A.—In this matter a petition has been filed in the Court of Common Pleas complaining of the return of Mr. Hughes, as a member of the House of Commons. Within the five days allowed for taking preliminary objections a paper was filed, which was described in argument as in the nature of a plea to the jurisdiction of the Court. Its object was to raise the question, whether the Dominion Parliament could under the B. N. A. Act confer upon a Provincial Court authority to proceed upon an election petition. This objection having been overruled, the respondent desires to appeal to this Court against that decision. Mr. Hodgins on his behalf has moved for an order to advance the appeal, so that it may be set down for hearing at the ensuing sittings. Mr. Robinson, who appeared for the petitioner, stated that he had no objection to any order being made to expedite the proceedings, if an appeal would lie. It was accordingly arranged that the matter should be dealt with by me as if there were a cross-application to quash the appeal.

After careful consideration of the views presented by the learned counsel, I am clearly of opinion that this Court has no jurisdiction to review the decision of the Court of Common Pleas. It is argued on behalf of the respondent that the right of appeal cannot be taken away except by express enactment. That may be conceded, but it is

necessary to be satisfied that it ever existed, before it is worth while considering whether it has ever been taken away. The first argument is, that the right exists by virtue of the very large and comprehensive language of section 18 of the Court of Appeal Act, by which it is provided that an appeal shall lie to this Court from every judgment of any of the Superior Courts; while the third section defines the word "judgment" as inclusive of any judgment, decree, rule, order, or decision. Hence it is urged that this being a decision of the Court of Common Pleas must be appealable. To this it is answered that it is not a judgment of the Common Pleas, but of an Election Court, and there was some discussion as to the proper deduction to be drawn from the opinions of the learned Judges with reference to its character. That, however, seems to me to be wholly immaterial to the question I am now considering, on the simple, and, I confess it appears to me, plain ground, that no enactment of a Provincial Legislature can create a right to appeal in the case of a Dominion controverted election. That right must have its source in the body with which rests the ultimate authority to prescribe laws for regulating the due return of members. Suppose that the Dominion Act had provided that all petitions from this Province should be tried by the Court of Common Pleas, and that its decision should be final. It would, I think, require some courage to argue that this Court could entertain an appeal upon the strength of the general powers conferred upon it by the Provincial Legislature. It is not easy to perceive any substantial difference between the case supposed, and that of an enactment which indicates no intention that there should be an appeal to this Court.

This view, if it needs confirmation, receives it from the circumstance that this Court is one of those named in the 2nd sub-section of section 3 of the Controverted Elections Act for the reception of petitions. It may, indeed, be found that there is great weight in the suggestion made by Mr. Hodgins, that the task of determining the precise extent of

jurisdiction conferred upon this Court by the Act is by no means free from difficulty. It may become a matter of grave consideration whether the simple insertion of this Court in the list of those designated for the Province, when coupled with the declaration that each of the Courts shall have the same powers, jurisdiction, and authority, with reference to an election petition and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction, is sufficient to give an Appellate Court original jurisdiction. I may add that the difficulty will not be diminished by a perusal of the 35th section of the Act, which it may be contended virtually excludes this Court, and any argument which may be legitimately founded upon its terms is not affected by its subsequent repeal. These or similar considerations it is not necessary, and would not be proper, to discuss at present; but I think that the 2nd sub-section may well be referred to as proof that for the purposes of the Act the Legislature at most made this Court one of co-ordinate jurisdiction.

It is then argued that the combined effect of the Dominion and Provincial Legislation contained in 38 Vict. ch. 11, sec. 54 (D.), 39 Vict. ch. 26, sec. 17 (D.), and ch. 37 R. S. Ont., is to create a right of appeal. By these it is enacted that the Supreme Court shall have jurisdiction in suits, actions, or proceedings, in which the parties by their pleadings have raised the question of the validity of an Act of the Parliament of Canada, when in the opinion of a Judge of the Court in which the proceeding is pending such question is material; and in such case the Judge shall, at the request of the parties, and may without request, order the case to be removed to the Supreme Court in order to the decision of such question. Upon this it is contended that a Judge of the Court of Common Pleas could have ordered this case to be removed to the Supreme Court, and that therefore there is a right to obtain access to that Court through the ordinary avenue in the Province. It does not seem difficult to detect the fallacy of this argument. After making

the concession that the question of the validity of a Dominion Act can be said with strict correctness to have been here raised by the pleadings, it involves two assumptions, neither of which I see my way to accept. It assumes that the petition against the return of the respondent is a suit, action, or proceeding, within the meaning of the statutes to which I have referred. I have a strong opinion that this position is wholly untenable. The context in the Dominion Act, and the manifest object aimed at by this extension of the powers of the Supreme Court, are sufficient to shew that an election petition was not then entering into the contemplation of the Legislature. I am utterly unable to imagine that the Dominion Parliament ever entertained the notion that upon the consent of a Provincial Legislature being obtained a Judge might refer to the Supreme Court a constitutional question raised upon a controverted election of a member of the House of Commons. To such a provision the consent of the Provincial Legislature was certainly not more essential than to the transference of the power of trying an election petition to a Provincial Court.

But further, the argument assumes that, if a Judge of the Court of Common Pleas could have transferred the decision of this disputed question to the Supreme Court, it follows that the party who conceives himself aggrieved has a right to get to that Court through the medium of this Court. This proposition has no support either in reason or authority. If a Judge refused to send a case to the Supreme Court, upon what principle is this Court to review his discretion? Or if he chose to send it, upon what ground is there to be an appeal?

I think that Parliament intended to prescribe a method of arriving at a final conclusion in these cases with the least possible delay. It was never intended that there should be successive appeals upon any and every point which a respondent might choose to raise. It gave him the opportunity of taking preliminary objections to the petition, but it wisely thought that the final decision of

any points arising under this head might very safely be left to the Court in which the petition was filed. It then gave an appeal to the Supreme Court upon any question of law or fact, which might arise at the trial. If the objection upon which it is now desired to take the opinion of this Court is a preliminary one, the decision of the Court of Common Pleas is final. If it is not a preliminary one, I presume there is some other mode in which the respondent can bring it forward. In either view I have no doubt that it is not within the cognizance of this Court, and I therefore quash the appeal, with costs.

RE EAST ELGIN ELECTION CASE.

Dominion Elections Act of 1874, sec. 73—Striking off corrupt votes.

Sec. 73 of the Dominion Elections' Act of 1874, which provides for striking off votes equal in number to the corrupt votes, only applies where the seat is claimed.

The clauses in the petition herein which did not claim the seat, framed under the above section, were therefore struck out, with costs to the respondent.

The petition was filed by Archibald Blue, praying that it might be determined that the respondent was not duly elected or returned at an election for the Dominion Legislature, and that the election was void.

1. It stated that the petitioner was a person who was duly qualified to vote at the election.

2. That the election was held on the 10th and 17th of September, 1878, when Thomas Arkell and Colin McDougall were candidates, and the returning officer had returned the respondent, Thomas Arkell, as being duly elected a member of the House of Commons.

3. That the respondent, by himself and by his agents, with his knowledge and consent, prior to, at, and during the

election, was guilty of corrupt practices as defined by the Dominion Elections Act, 1874, and the Dominion Controverted Elections Act, 1874, and by the common law of Parliament.

4. That the respondent, by himself and by his agents, was prior to, at, and during the election guilty of bribery, treating, and undue influence and personation, and of inducing persons to commit personation as defined by the said Acts.

5. That the respondent, by himself and by his agents, was prior to, at, and during the election guilty of wilful offences against the 92nd, 93rd, 94th, 95th, 96th, and 97th sections of the Dominion Elections Act, 1874.

6. That persons guilty of bribery, treating, and undue influence, and persons bribed, treated, and unduly influenced by the respondent, and by persons in his behalf, and persons retained and employed for reward by, or on behalf of the respondent, for the purposes of the election, or some of them, as agents, clerks, messengers, or in any other employment, received ballot papers, and voted at the said election contrary to the statutes in that behalf.

7. The petitioner claims that there should be struck off from the number of votes appearing to have been given to the respondent one vote for every person who voted at the election, and was so guilty of bribery, treating, and undue influence, and was so bribed, treated, and unduly influenced, and was so retained or employed for reward.

The petitioner prayed that it might be determined that the respondent was not duly elected or returned, and that the election was void.

The respondent, by way of preliminary objection, after reciting the 6th and 7th clauses of the petition, and the prayer, submitted that the provisions of the statute as to striking off votes applied only to petitions in which the seat was claimed on behalf of one of the candidates, and that the petition herein not claiming such seat, the said clauses of the petition were improper and should be struck off with costs to be paid to the respondent.

H. J. Scott, for the respondent.
Hodgins, Q. C., for the petitioner.

January 6th, 1879. PROUDFOOT, V. C.—The charges of bribery, treating, and undue influence are all corrupt practices under the Dominion Elections Act, 1874, sec. 98, and by sec. 102 they avoid the election. If these be once established the respondent cannot hold the seat, and there would be no object in striking off the votes, unless the seat were claimed for some one, when it would be necessary to show that he had a majority of votes, and so it seems to be considered by sec. 73, which provides for the striking off votes equal in number to the corrupt votes where the seat is claimed for some one.

Under the Dominion ballot system, which aimed at the profoundest secrecy in regard to the votes of the electors, there was no other mode in which a candidate could acquire the benefit of proving corruption by his opponent, than by imposing this arbitrary rule. It could not be known how the corrupted elector voted, there was no means of tracing the identical voting paper deposited by him, and therefore an equivalent was to be deducted. These acts of bribery, treating, and undue influence, were all offences at common law, and any votes procured by means of them were void, and perhaps avoided the election. But in the case of a scrutiny, it was the corrupt vote itself that was struck off, and when the introduction of the ballot rendered that impossible, legislative authority was needed to supply the defect, and the provision of the statute must be the measure of the right.

The 94th section, in regard to treating, imposing a penalty on the guilty person, and directing that on the trial of an election petition a number of votes equal to the corrupt ones shall be struck off, does not expressly state that this will be done only in case the petitioner claims the seat; but from the nature of the case that must be implied, as the statute makes treating a corrupt practice, and if it be proved it avoids the election, and there can be no use in striking off the vote unless the seat be claimed.

In regard to the votes of hired agents, the case is somewhat different. It was not an offence at common law for a hired agent to vote, and it is not made a corrupt practice by the statute. I think, under section 40, that the vote is an illegal one. But it is entirely a creature of the statute, and as the vote itself cannot be identified, so as to be removed from the list, there must be authority given by the statute to strike off an equivalent. The only authority I find is in the 73rd section, which applies when the seat is claimed, but not otherwise.

I do not see why an equivalent for such votes might not have been authorized to be struck off on any petition, whether claiming the seat or not, but I have not been able to find any such general authority.

Cases such as the *Wigtown Election*, 2 O'M. & H. 215, where a scrutiny is had on account of objections to the voting papers, rest on an entirely different foundation The identical vote which offends against the Act is thrown out. There is no question of equivalents.

I think the clauses objected to must be struck out, with costs to the respondent.

IN RE WHITE AND GIBBON—INSOLVENTS.

Insolvent Act of 1875—*Proof by retiring partner for balance due.*

The creditors of a partnership consisting of three partners, consented to give them an extension on several conditions, one being that one of the partners should retire from the firm. When the dissolution took place a sum of $1,198 stood on the books of the partnership to the credit of the retiring partner, but nothing was said at the time in reference to this claim.

Held, that this claim was not provable against the estate of the continuing partners on their insolvency.

THIS was an appeal from an order of the junior Judge of the County of Wellington allowing the claimant, William Gay, to rank and receive dividends from the estate of the insolvents.

The claimant and the insolvents were, previously to the month of March, 1877, carrying on business in co-partnership.

At that date they called a meeting of their creditors, and submitted a statement of their affairs, shewing liabilities to the amount of $15,056 and nominal assets, without any allowance for bad debts or depreciation in value, to the amount of $18,287.

At that meeting an extension of four, seven, ten, and twelve months was granted, on condition that one of the largest creditors should postpone $2,000 of his claim until these deferred instalments were all paid; and on the further condition that the present claimant should retire from the firm.

The claimant was not present at the meeting, but on the arrangement being communicated to him he acquiesced in it, and a dissolution was signed, and notes of the new firm given to the creditors, with one exception, for the instalments agreed on. Nothing was said in the dissolution as to the claimant's demand, but in point of fact there was previously to and at the time of the dissolution a sum of $1,198 standing to the credit of the claimant in the books of the partnership.

This formed the subject of the claimant's present demand against White and Gibbon, who, after carrying on the business for about six months, became insolvent.

The claimant stated that it was understood that his claim was not to be enforced until the creditors' instalments were paid; but White and Gibbon appeared to have considered that it would form a proper claim upon them after the creditors were paid, and Gibbon, one of the firm, promised him that it should be paid.

The appeal was argued on the 9th September, 1879, before Burton, J. A., sitting alone in insolvency.

Walker, for the appellant.

Drew, Q.C., for the respondent.

The cases cited are referred to in the judgment.

September 19, 1879. BURTON, J. A.—It is contended that inasmuch as the claim in question was admitted as a partnership liability in the books of the firm, it became, without any express agreement to that effect, a liability of the continuing partners for which he could have sued at law, and for which he is now entitled to prove against the estate of the continuing partners; but this is losing sight of the fact that the sum so appearing in the books was a debt due from the firm of which he was a partner, and did not at any time constitute a debt against two of the firm; for the amount so entered to the credit of Gay in the books of the firm he was in fact his own debtor.

No doubt, as suggested upon the argument, where a partnership has been dissolved, and two of the partners take the partnership property at a valuation, and the share of the retiring partner has been ascertained, he may sue at law for the amount payable to him. What would have been due by these two partners upon a final winding up of the partnership accounts has never been ascertained, and it is quite clear that no action at law could have been sustained upon the facts which appear on the depositions.

In *ex parte Hall*, 3 Deacon 125, cited by Mr. Drew, the

dissolution occurred some six years before the bankruptcy, *and the accounts were then adjusted and a bond given for the amount found to be due to the retiring partner, with the assent of the joint creditors*, who agreed to accept the liability of the continuing partner. There was no reason therefore why the claim should not be admitted to proof. And so in the case of *ex parte Turquand*, 2 M. D. & DeG. 343, also cited, the person seeking to prove was held not to have become a partner, although a partnership was in contemplation. The partnership was prospective only, and not actually in existence.

Ex parte Grazbrook, 2 Dea. & Ch. 189, is also distinguishable. There the debt was contracted upon a balance acknowledged to be due to the retiring partner upon a stated account at the time of the dissolution of the partnership, and long prior to the bankruptcy. At that time it became a debt on which he could have commenced an action (as he had done), against the bankrupt, and if in that state of circumstances the bankrupt had filed a bill in equity for the purpose of restraining such action, the account stated would have found a decisive objection to it.

The case referred to, of *Re Todd*, DeG. 7, is no authority in favour of the claimant's contention. There upon the dissolution it was agreed that as between the partners, Deflume, the retiring partner, was entitled to £8000 and £1,175 as a creditor of the partnership. The continuing partner *gave his bond for the* £8000, and paid the other amount. A new agreement was subsequently entered into under which this bond was cancelled, and new bonds given to parties who were creditors of Deflume. It seemed to be admitted, rightly or wrongly, that Deflume could not, if the holder of the original bond, have proved against the estate of the bankrupt in competition with the creditors; it was, however, held that the nominees of Deflume held the new bonds, supported by a valid agreement good in point of law, as the separate creditors of the bankrupt.

In the present case no balance was struck. It was manifest that the firm were unable to meet their engage-

ments and compelled to apply for an extension. The creditors were entitled to have their debts paid from the joint assets, and Gay was entitled only to a lien on the surplus, if any, before a division among the partners. When the creditors insisted on his retiring, they still intended to hold their claim upon the partnership assets, and evidenced that intention by accepting the notes of the two partners in whose hands those assets were left. No presumption therefore could arise from what then occurred, that it was in the contemplation of any of the parties that one of the joint debtors should be allowed to become a creditor, and to that extent diminish the assets from which, at the time of the dissolution, the creditors had a right to look for payment—the claimant in fact admits that he was not to enforce his claim until the creditors were paid.

I am of opinion, therefore, that the learned Judge erred in allowing this claim to rank upon the estate, and that his order must be set aside, and the claim expunged.

The appeal will be allowed, with costs of this appeal, and of the contestation in the Court below.

Appeal allowed.

RE DUFFERIN ELECTION CASE.

Corrupt practices—Status of petitioner—Preliminary objections.

The fact that a petitioner in an election petition, with regard to the Ontario Legislature, has been guilty of corrupt practices during the election, is no objection to his *status* as a petitioner.

As the Ontario Election Act, R. S. O. c. 10, makes no provision, as the Dominion Act does, as to the time within which preliminary objections must be taken, the special circumstances of such an application must determine whether it is made with sufficient promptitude.

This was a motion to take the petition off the files, on the ground that the petitioner had himself been guilty of a corrupt practice during the election.

McCarthy, Q. C., shewed caused. This application is too late, as the objection urged here against the status of the petitioner is a preliminary objection: *Cunningham* on Elections, p. 231. It is true that nothing is said in the Local Act as to the time within such an objection should be taken; but if the analogy of the Dominion Controverted Elections Act, 37 Vic. c. 10, s. 10, D., which limits the time for such application to five days, applies, and it is submitted it does, this motion is altogether too late. There is no fair reason for the delay. Want of knowledge is no ground whatever: *South Huron Case*, 29 C. P. 301. If, however, this is not a preliminary objection, it can only be disposed of at the trial. The evidence is clearly insufficient to convict the petitioner of corrupt practices.

Hodgins, Q. C., contra. There is no settled practice as to the time within which this objection should be taken. In Ontario it may be taken at the trial. In Quebec it may be taken as a preliminary objection; and the decisions shew that there, as in England, the Courts draw a distinction between the case of a voter-petitioner and that of a candidate-petitioner. In the *Youghall Case*, 21 L. T. N. S. 306, the learned Judge held that a charge of bribery against a voter-petitioner should have

been disposed of by the Court of Common Pleas before that case was sent for trial. Under the old committee practice, this charge of bribery was a proper preliminary objection against a voter-petitioner, and was investigated before the petitioner could proceed: *Caermarthenshire*, 1 Peck 291; *Herefordshire*, 1 Peck. 210; *Honiton*, 3 Luders 314. Under the Voters' List Act, Hagarty, C. J., held that the words "a voter or person entitled to be a voter," meant something more than the name of the voter being on the list: *Re Parsons and Toms*, 36 U. C. R. 88. In Quebec, where a petition was presented by voters and a candidate, the Court held this objection a good one against the voter-petitioners, but not against the candidate-petitioner: *White* v. *MacKenzie*, *West Montreal Case*, 19 L. C. Jur. 113; *L'Assomption*, 19 L. C. Jur. 6. In England, under a similar statute, where a voter is bribed, or has bribed others, he becomes *ipso facto* disqualified and incompetent to petition: *Cunningham* on Elections, pp. 211, 234. Martin, B., says that "a bribed voter who has voted loses his status, and his vote is an absolute nullity": *Norwich Case*, 19 L. T. N. S. 621. And the name of a voter guilty of bribery will be struck off the poll, even where it has not been included in the scrutiny lists: *Barnstaple* (*Leys Case*), Wol. & Bris. 242. A candidate-petitioner though guilty of bribery may petition, and cannot be tried until the recriminatory case is gone into: *Drinkwater* v. *Deakin*, L. R. 9 C. P. 626; *South Renfrew Case*, 10 C. L. J. N. S. 286. In the *South Huron Case*, 29 C. P. 301, the Court followed the latter cases, though that was the case of a voter-petitioner. But if that case was rightly decided, then sec. 163 of the Ontario Act, which is not in the Dominion Act, makes the vote of an elector guilty of corrupt practices null and void. He also referred to *Hodgins's* Manual on Voters' Lists, pp. 20, 65; 32 Vict. ch. 21, sec. 70, O.; 34 Vict. ch. 3 sec. 47. The charge should not be disposed of on affidavits, but the witnesses should be examined, and it must be tried by two Judges: R. S. O. ch. 11 sec. 38.

October 29, 1879. Moss, C. J. A.—Affidavits were filed on behalf of the respondent with the view of shewing that the petitioner had in the interest of Mr. McGee, the unsuccessful candidate, promised to pay for teams to be used in conveying voters to the poll. The petitioner has positively denied that he made any such promise, and has given an explanation by no means improbable in itself of the conversation in the course of which the illegal act is charged to have been committed. It was very properly conceded by Mr. Hodgins for the respondent that upon these materials I could not be asked to make an immediate order to take the petition off the files, but he urged that I ought to direct the deponents to be cross-examined before myself, and then decide the question upon their evidence. I presume that this course might be taken in a proper case under the authority of Rule 50, Hilary Term, 1871, 21 C. P. 450, which provides that all interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a Judge, who shall have the same control over the proceedings under the Controverted Elections Act of 1871, as a Judge at Chambers in the ordinary proceedings of the Superior Courts. Although the affidavits produce the impression that the respondent might find it difficult to establish the charge, I should feel it to be my duty to give him the opportunity of further investigating it, if I were satisfied that it would, when established, be a valid objection to the maintenance of the petition. That is, therefore, the important question with which I have now to deal.

Mr. McCarthy argues that if this is a preliminary objection it is made too late; and if it is not, that it can only be disposed of at the hearing. I do not think that if this is a proper objection the respondent is precluded from urging it on account of any delay. It is attempted to draw an analogy in this respect between the Provincial and the Dominion Acts, the latter of which limits the time for raising preliminary objections to five days. But the Provincial Act makes no provision for taking preliminary

objections, nor is there any practice prescribed by the General Rules. Accordingly, the special circumstances of an application must determine whether it has been made with sufficient promptitude. Here, the respondent moved with all reasonable diligence after he had learned that the deponents were prepared to make such statements; and this, I think, is all that could be required. Nor can I accede to the argument that the objection is one which it is for the Judge to dispose of at the trial. As was well pointed out by Mr. Justice O'Brien in the *Youghall Case*, 21 L. T. N. S. 306, the Judges sit under the authority of an Act of Parliament which requires them at the end of the trial to determine whether the member whose return is complained of was duly elected, or whether the election was void, and to certify their determination to the Speaker. The learned Judge emphatically remarked: "The objection is no part of what I am to try. It is not included in what I have to report."

It would be a curious anomaly if after a time had been fixed for the trial, and after the parties had prepared their whole case and the witnesses were present, and two Judges had attended to try the petition, it should be the duty of the Judges to make the preliminary enquiry whether there was to be a trial at all. Again, the motion, directed as it is against the status of the petitioner, necessarily assumes the shape of an application to take the petition off the files of this Court. What power or jurisdiction do the Judges or Judge appointed to try the petition possess to order a petition to be removed from the files? There is not to be found in the Statutes any trace of intention to impose upon them such a duty, or confer upon them such a power.

It may not be unworthy of observation that in this, if in any case, the argument *ab inconvenienti* would seem to have great weight. It is true that when petitions were heard before committees, objections of this nature were considered upon the petition being opened; but for that there was one sufficient reason, namely, that it was

impossible to raise them before. Since the transfer of the jurisdiction to the Court and Judges the practice of committees in that respect does not, in my judgment, form any guide.

I think, therefore, that if the objection is tenable it ought to be disposed of by the Court of Appeal, and not by the Judge or Judges at the trial. But after much consideration, and an examination of the conflicting decisions, I have formed the opinion that such an objection to the *status* of a petitioner can no longer prevail. During the period of trial by committees the objection seems to have been sometimes sustained, and sometimes disallowed. In this as in some other points there does not appear to have been uniformity of practice. Each committee did what seemed good to the majority. But it must be conceded that text-writers of acknowledged authority in England lay down rules which strike directly at the *status* of the petitioner, if the charge against him were established. Without multiplying instances it will be sufficient to quote the language of Mr. Cunningham in his very recent, and I believe very useful, treatise. At p. 231, he says: "Where a voter is bribed or has been guilty of bribing others at the election, he becomes *ipso facto* disqualified, and on proof thereof he would be held incompetent to petition." Again, at p. 234: "Thus it has been seen that the commission of a disqualifying offence by a voter at the election which is the subject of the petition disentitles him to petition, on the ground that he had no right to vote, or in other words that he lost his *status* as an elector the moment the offence was committed. This doctrine was acted on in the *Youghall Case*, by O'Brien, J., who allowed evidence to be given to determine the truth of an allegation that the petitioning elector had been guilty of bribery at *the* election, made with a view of preventing the petition being proceeded with." The authority cited for these propositions is the *Youghall Case*, 21 L. T.N.S. 306. Now, while it is true that the learned Judge in that case evidently proceeded upon the assumption that the

objection was one which might be entertained to the *status* of the petitioner, he certainly was not deciding that point. On the contrary, as will appear from the reference already given, he was principally engaged in combatting the notion that it was the duty of the Judge at the trial to enquire into its correctness in fact.

I was also referred by the learned counsel to the observations of Martin, B., in the *Norwich Case*, as reported in 19 L. T. N. S. 615. I do not find anything in that case which may be construed into a decision or even an expression of opinion upon the point under discussion, and the learned Judge's own report of his judgment to the House of Commons shews that the report in the *Law Times* must be received with caution.

The current of authority in our own Courts seems to me to be in favour of the view I am now taking. In the *North Victoria Case*, 10 C. L. J. N. S. 223, the question directly presented for decision was, whether the petitioner, who had been an unsuccessful candidate, should be stopped from proceeding, because he had not the required property qualification. But in dealing with it Richards, C. J., made use of the following observations, at p. 223: "On turning to the statute, any person interested in the election sees it plainly stated that a candidate or voter duly qualified to vote at the election may petition. Under such circumstances all persons interested in the matter would assume that the petition would go on. The special provisions in the Act to guard against a collusive withdrawal of the petition would all induce an interested elector to suppose when a petition was presented by a candidate, or a voter duly qualified to vote at the election, that nothing could be urged against the enquiry being proceeded with." Indeed the whole reasoning of that able and experienced Judge, who was pronouncing the judgment of the Election Court, is opposed to the maintenance of the present objection. *In re South Huron Election* for the House of Commons, 29 C. P. 301, the Court of Common Pleas had to decide upon a preliminary objection founded upon the allegation that

the petitioner, who was a voter, had been guilty of corrupt practices. It was distinctly held that this did not destroy his *status* as petitioner.

The Court of Queen's Bench has, I believe, adopted the same view of the law as applicable to Dominion elections, and if this were a petition against such an election I should have contented myself with simply following these decisions. But as distinctions have been attempted to be drawn in argument between the two statutes it will be necessary to briefly compare their provisions.

The 7th section of the Dominion Controverted Elections Act, 1874, provides that a petition may be presented by a person who had a right to vote at the election, but that nothing in the Act shall prevent the sitting member from objecting to any further proceeding on the petition by reason of the ineligibility or disqualification of the petitioner. It is to be observed in passing, that notwithstanding this distinct proviso the Court held that bribery at the election in question did not furnish ground for a preliminary objection.

The 3rd section of the Ontario Act, R. S. O. c. 11, requires the petitioner to be some person who voted or who had a right to vote. It contains no reference to preliminary objections, and provides no specific mode of attacking the eligibility or qualification of the petitioner.

The 104th section of the Dominion Act, 37 Vic. c. 9, D., provides that any person other than a candidate found guilty of any corrupt practice in any proceeding in which, after notice of the charge, he has had an opportunity of being heard, shall be incapable of voting at any election of a member of the House of Commons.

The 164th section of the Ontario Act, R. S. O. c. 10, is precisely the same, so far as the point now under consideration is concerned, except that it disqualifies the guilty person from being registered as a voter, and contains the saving clause that no person other than a candidate shall be subject to these disabilities by reason of a merely technical breach of the law, or of any act not being an intentional violation of

law and not involving moral culpability or affecting the result of the election. It is upon these enactments, all of which come into play in dealing with a Dominion election, that the decision in the South Huron case, 29 C. P. 301, proceeded. The position very distinctly taken by all the members of the Court was that the disqualification did not arise until the voter had been pronounced guilty by the competent tribunal. The learned Chief Justice pointedly said, at p. 307: "The disqualification, it is plain, arises by the fact of the petitioner having been or being *found* guilty after notice of the charge against him. * * This petitioner has not been *found* guilty. He was not therefore disqualified from voting; and being a duly qualified voter at the election, he is a properly qualified petitioner." The language of Mr. Justice Gwynne, at p. 305, is equally express: "He was not disqualified from voting, the Act only having the operation of disqualifying a person as a voter after conviction:" and Mr. Justice Galt thought it to be plain that before disqualification attaches the voter must have been found guilty after he has had an opportunity of being heard.

It is urged that in pronouncing this judgment the Court overlooked a distinction between the case of a candidate-petitioner and a voter-petitioner. I cannot perceive that there is ground for this criticism. The Court seems to me to have founded its opinion upon the language of the Act, which treats of the disqualification of voters.

Great stress, however, was laid upon the 163rd section of the Ontario Statute, which is not to be found in the Dominion Act. This section declares that if on the trial of any election petition it is proved that any elector voting at the election was bribed, he shall be disqualified from voting at the next general election; and that if it is proved that any corrupt practice has been committed by any elector voting at the election his vote shall be null and void. Hence it is argued that it may now be proved before the trial that the petitioner was guilty of a corrupt practice, and that his vote being as a consequence null

and void, his right to petition is *eo instanti* destroyed. I do not so read the statute. Where is it to be proved that he has been guilty? Clearly, in my opinion, at the election trial.

I think that in all fair construction the words "on the trial of an election petition" must be applied to both members of the sentence. It surely was never intended that it might be proved in any way that a Court might direct. It is true that except where there are recriminatory charges against the unsuccessful candidate, the proceedings of a petitioner, who was his supporter, are not likely to come under review, and it is accordingly asked, how is he to be found guilty at all? The answer is sufficiently simple. His conduct may be investigated and his vote declared void for the purpose of a scrutiny. This in my opinion was the proceeding which the Legislature had in contemplation, when it affirmed the principle that his resorting to a corrupt practice made his vote null and void. I decline to attribute to it the intention of countenancing the absurd result that if upon a scrutiny or in any other way it was proved upon the trial that the petitioner had committed a corrupt practice, the petition should be forthwith dismissed, no matter what charges had been or could be established against the sitting member. I prefer to believe that the Legislature recognized the salutary doctrine that the public, as well as the petitioner, have an interest in the fair and rigorous investigation of the means by which a return has been secured. As Richards, C. J., pointed out in the *South Renfrew Case*, 10 C. L. J. N. S. 286, that doctrine within reasonable limits has received the sanction of eminent authorities, and I venture to think it is justified by considerations of high policy. The importance to the public of determining whether the petitioner's hands are clean is insignificant compared to that of being satisfied that the respondent has not obtained possession of the seat illegally. I cannot better illustrate this than by quoting the extremely apt language of Meredith, C. J., in the

Megantic Case, 19 L. C. J. 4: "A corrupt candidate may be unfit to sit in Parliament; but, notwithstaning that, he may be a fitting instrument to unseat a member as corrupt as himself." I need do no more than suggest that if the present contention succeeded, the ingenuity of electioneering agents might be equal to the test of devising a scheme, by which one of the supporters of their candidates should be permitted to desert to the enemy for the express purpose of committing corrupt practices, and afterwards temporarily appearing as petitioner.

Upon the whole I am of opinion that the decisions neither of Election Committees nor of the Courts require me to put this charge into a train for further investigation. I think that even if there were any express judicial opinion in England warranting the proposition stated in the text-books, there is sufficient difference between their statute and ours to absolve me from the duty of bowing to its authority without enquiry, and that the tendency of our decisions is in the opposite direction. I am further convinced that the views I have endeavoured to support are calculated to promote the great end of securing purity in elections.

It is, I trust, apparent from the observations I have made that my decision does not interfere with the rights of the respondent to object that the petitioner had not the right to vote, because he never possessed the necessary qualification, or because he had been previously found guilty of corrupt practices by the proper tribunal.

I therefore dismiss the summons, leaving it to the full Court to correct me, if I am mistaken; but in view of the state of the authorities, and of the saving of expense that has presumably been effected by raising the question now, instead of deferring it to the trial, I exercise the discretion given to me as to the disposition of costs by ordering them to be costs in the cause to the successful party.

NERLICH ET AL. V. MALLOY ET AL.

Division Court bailiff—Action for false return.

To an action against a Division Court bailiff and his sureties for neglect to execute a writ or return it in due time, and for a false return, the defendants pleaded that the execution was not enforced owing to a threat by the principal creditors of the debtor to place him in insolvency if it was proceeded with, and that while the goods were being advertised for sale an attachment was issued against the debtor, and the plaintiffs suffered no damage in consequence of the breaches alleged.

At the trial the jury were directed to find a verdict for the defendants, on the ground that this plea and another had been proved.

Held, reversing the judgment of the County Court of York, that it was for the jury, and not for the Judge, to say whether the bailiff's inaction had caused the plaintiffs damage, and a new trial was therefore ordered.

Semble, also, that under sec. 221 of the Division Courts Act, R. S. O. ch. 47, the plaintiffs were entitled to nominal damages upon proof of a breach of duty without shewing any actual damage.

Before the commencement of this action the plaintiffs had taken summary proceedings against the bailiff for neglecting to levy under sec. 220, when their complaint was dismissed.

Held, no bar to this action, which was brought under sec. 221.

Appeal from the County Court of the County of York.

The appellants, who were plaintiffs in a Division Court suit, in which an execution had been delivered to the defendant Malloy, as bailiff, declared against him and his sureties, alleging as breaches of the statutory bond neglect to execute the writ, neglect to return the writ within three days after the return day, and a false return of no goods. Several grounds of defence were set up by various pleas, of which it is only necessary to notice the third and the fourth.

The third plea alleged that the defendant Malloy received the writ on the 13th May, 1876; and before the alleged grievance, and on the same day, levied upon the goods of said Henderson, and before the same were removed or sold, and immediately after the seizure the said defendant was notified in writing by the attorney for one of the principal creditors of the said Henderson, that if Malloy proceeded with the sale of said goods immediate proceedings would be taken to place Henderson in insolvency; and afterwards, and before said goods were sold, and while they were being advertised pursuant to the statute, a writ of attachment duly issued against Henderson, who duly made

an assignment of his estate under the provisions of the Insolvent Act of 1875, and the goods under seizure became the property of the assignee, and thereupon Malloy gave up the seizure and returned the writ according to law, and that the plaintiffs suffered no damage by reason of the the alleged breaches.

By the fourth plea the defendants set up, that after the return of the execution a summons was obtained in Chambers in the Division Court suit, calling on Malloy to shew cause why he should not be ordered to pay into Court to the credit of the cause the amount of damage alleged to be sustained by the plaintiffs by reason of his neglect, connivance, or omission; and that both the parties appeared, and the Judge, after hearing them, discharged the summons with costs; and that the order still remained in force, and the cause of action mentioned in such summons, and the breaches alleged in the declaration, were the same.

At the close of the evidence the learned Judge practically withdrew the case from the jury, and directed a verdict for the defendants, on the ground that these pleas had been completely proved. In Term he refused a rule *nisi*, which was moved for on the ground that the verdict was contrary to law and evidence, and for the rejection of evidence. His judgment upon that motion was founded upon the view he entertained of the effect of the fourth plea. At the trial proof was given of the copy of the summons served upon the bailiff, which was substantially in accordance with the statement in the plea, and upon which was endorsed the Judge's order of dismissal. The plaintiffs' counsel desired to adduce evidence to shew that the discharge of the order had not proceeded upon any consideration of the merits, but the learned Judge ruled that such evidence was inadmissible. No proof was given of the identity of the complaint then urged by the plaintiffs with their present cause of action beyond that suggested by the terms of the summons. In *banc* the learned Judge held that the order was in the nature of a judgment, and concluded the plaintiffs.

The plaintiffs appealed.

The case was argued on the 11th November, 1879 (*a*).

J. O'Donohoe, for the appellants. The learned Judge was wrong in refusing to admit the evidence tendered to shew that the order made by the Division Court Judge was not conclusive, owing to its having been made without hearing evidence. But the order could not, in any event, have acted as an estoppel, so as to preclude the plaintiffs from bringing this action, as the order only dealt with the damages sustained by the plaintiffs by reason of the neglect in not levying, while this action is for neglecting to return, and making a false return of the writ, under the 221st section of the Division Courts Act, R. S. O. ch. 47. The order was not proved in the manner pointed out by R. S. O. ch. 47, sec. 37: *Regina* v. *Rowland*, 1 F. & F. 72; *Dewes* v. *Rily*, 11 C. B. 434. *Brown* v. *Wright*, 35 U. C. R. 378, will be cited to shew that the bailiff is not liable for neglecting to enforce the execution, owing to the debtor's threat to go into insolvency, but in that case the assignment had been made before the writ was placed in his hands. It is clear that the Judge had no power to withdraw the case from the jury.

J. E. McDougall, for the respondent. The remedy against bailiffs under sections 220 and 221 of the Division Courts Act are clearly in the alternative; and inasmuch as the plaintiffs elected to proceed summarily, the order made thereon is a complete bar to this action: *Bigelow* on Estoppel, 45, 2nd ed.; *Brown* v. *Yates*, 1 App. R. 374; *Austin* v. *Mills*, 9 Ex. 288. The order was sufficiently proved by the production of the original, duly signed by the Judge: *Stett* v. *Halford*, 4 Camp. 17; R. S. O. ch. 62, sec. 30. At any rate we are entitled to succeed on the third plea, as the evidence shews that no damage was sustained by the neglect to make a seizure, and it is well laid down that in such a case there can be no recovery: *Brown* v. *Wright*, 35 U. C. R. 378; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175; *Hobson* v. *Thellusson*, L. R. 2 Q. B. 642.

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

November 12th, 1879. MOSS, C. J. A., delivered the judgment of the Court. We gather from the report of the learned Judge's decision that he was of opinion that the plaintiffs had an election between adopting a summary proceeding by way of summons and bringing an action upon the bond, and that having taken the former course the order operated as a final and conclusive adjudication upon their rights. Considering the smallness of the amount at stake, and the protracted litigation of which it has been the subject, for the matter seems to have been twice brought down to trial already, we should not have been sorry to see our way to the same conclusion, but we are constrained to hold it untenable.

Without relying upon the argument that if, as the plaintiffs sought to prove, the summons were dismissed upon a technical objection, and without any adjudication upon the merits, the order ought not to bar the present action, it is only necessary to refer to the 220th section of the Division Courts Act, under which the summons was issued, to perceive that the questions with which the Judge was authorized to deal are not co-extensive with the plaintiffs' cause of action. That section enacts that in case the plaintiff, by neglect, connivance, or omission, loses the opportunity of levying, then upon complaint of the aggrieved party and proper proof, the Judge shall order the bailiff to pay such damages as it appears the plaintiff has sustained; but it does not profess to give any summary remedy for neglect to return an execution within three days after the return day, or for making a false return. These breaches of duty are dealt with by the following section, which entitles the plaintiff to maintain an action against the bailiff and his sureties upon their covenant, and to recover the amount of the execution with interest, or such less sum as, in the opinion of the Judge or jury, the plaintiff under the circumstances is justly entitled to recover. As these are the plaintiffs' main grounds of complaint, it is very obvious that his remedy was not to be found in the exercise of the summary jurisdiction, but

in an action. Upon this distinct ground we must hold that the fourth plea was not, and indeed could not be, established.

The learned counsel for the defendants seemed to feel the difficulty of supporting the verdict upon this issue, but he relied strongly upon the other plea. This was in substance that the bailiff immediately levied, but that he was at once notified by the attorney for one of the principal creditors of the execution debtor that if he proceeded to sell the debtor would be placed in insolvency, and that before the goods were sold, and while they were being advertised pursuant to the statute, a writ of attachment was issued, and an assignee in insolvency appointed, whereupon the bailiff gave up the seizure and returned the writ, and that the plaintiff suffered no damage. It appeared from the evidence of the bailiff himself that he received the execution on the 13th of May, 1875, and at once went to the debtor's place of business and demanded payment, when the debtor declared that if he was pressed he would make an assignment in insolvency. On the same day the debtor's attorney gave him a written notice, that if he pressed the execution other creditors would place the defendant in insolvency, and the execution would be rendered valueless. In consequence, as he alleges, of this notification, the bailiff did not take proceedings to sell, but the debtor continued to carry on his business as usual, the bailiff contenting himself with frequently visiting the shop. On the 10th of June he procured a renewal of the execution for thirty days, without any communication with the plaintiffs, and being pressed by their attorneys to make the money, advertised the goods for sale on the 16th of June, whereupon the debtor was placed in insolvency, and the assignee took possession before any sale was effected.

Hence it is argued, upon the authority of *Hobson* v. *Thellusson*, L. R. 2 Q. B. 642, and *Brown* v. *Wright*, 35 U. C. R. 378, that the plaintiffs sustained no damage in consequence of the delay in enforcing the execution, and that the action is not sustainable. We entirely agree with the doctrine

enunciated in these cases. That doctrine is, that where the evidence demonstrates to the satisfaction of the tribunal dealing with the facts, that if the execution had been proceeded with in the ordinary course the plaintiff would have derived no benefit, because the debtor would have been placed in bankruptcy or insolvency before he could have realized, the plaintiff must fail. Damage being of the essence of the action, it follows that where the plaintiff has suffered none, the defendant must succeed. That rule, it may be observed, does not seem to apply in its entirety to the case of an action against the bailiff and his sureties for neglect to return an execution, or for a false return. The 221st section, to which reference has already been made, appears to give the plaintiff the right to recover something where there has been such breach of duty by the bailiff, and therefore he is probably entitled to nominal damages upon the bare proof of the breach without shewing any injury. But this is a question of little or no practical importance. The difficulty here in the way of sustaining the verdict, which appears to us to be insuperable, is, that the plaintiffs had a right to have the opinion of the jury upon this matter. It was for them, and not for the Judge, or for us, to say whether, under all the circumstances, the action or inaction of the bailiff had caused the plaintiffs damage. If we are at liberty to speculate upon probabilities, we might think that they were likely to lean to the defendants' contention; but it may be that they would have found that if the bailiff had pressed the execution, so small an amount would have been paid in order to avert proceedings in insolvency, The Court was not embarrassed with this difficulty in *Hobson* v. *Thellusson*, L. R. 2 Q. B. 642, because they were at liberty to draw inferences of fact, and, acting as jurymen, they found that the plaintiff had sustained no damage. The case of *Brown* v. *Wright*, 35 U. C. R. 378, was even clearer in favour of the defendant, for the assignment in insolvency had actually been executed before the execution was issued. There were, therefore, no goods, the property of the execution debtor, upon which a levy could be made.

The proper course was, for the learned Judge to have held that the fourth plea was not proved, and to have left it to the jury to say whether, if the bailiff had proceeded regularly upon the execution, the debtor would have been placed in insolvency, and a recovery thus prevented; and to have directed them that if this would have been the result, the plaintiffs could only recover nominal damages, under the 221st section; but that otherwise, as there were goods of ample value to satisfy the execution, the plaintiffs were entitled to a verdict for their full claim.

The appeal must be allowed, with costs, and a rule must issue in the Court below for a new trial, without costs.

GAULT V. BAIRD ET AL.

Insolvent Act of 1875—Composition deed—Construction.

A deed professing to be under the Insolvent Act of 1875 was made between the insolvent of the first part, certain sureties of the second part, and "the several firms, persons, and corporations who are creditors of the parties of the first part, and are also mentioned in the annexed list, of the third part." It provided for the payment of a composition of 75 cents in the dollar, which payment was guaranteed by the sureties, and concluded with the following clause:—"This deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars."

Held, on demurrer, affirming the judgment of OSLER, J., that this clause only applied to creditors mentioned in the annexed list, and that certain other creditors refusing to execute the deed did not prevent it from being operative.

Appeal from the judgment of Osler, J., sitting for the Court of Common Pleas.

DECLARATION: For that by deed, bearing date the 28th day of August, 1878, made between one David Collins and one W. G. Collins, of the first part, the defendants, of the second part, and the several persons,

firms, and corporations who were creditors of the parties of the first part, and who are mentioned in the annexed list, of the third part, the parties of the first part covenanted with the said creditors, and each of them, that they would pay to them, and each of them, a composition, at the rate of 75 cents in the dollar, in two equal payments, in four and six months from the date thereof, without interest; and the defendants, by said deed, guaranteed payment of the said composition moneys to the said creditors, and covenanted to endorse the notes to be given to each creditor to secure the due payment of the said composition.

And the plaintiffs allege that they were creditors mentioned in the said schedule, under the style of "Gault Bros.," and were then creditors of the said David Collins and W. G. Collins, for the sum of $3,500, and were entitled to receive a composition of 75 cents in the dollar on that amount, as per terms of said deed; and all times have elapsed and all things happened necessary to entitle the plaintiffs to receive payment of the first instalment of the composition on their said claim, yet the said David Collins and W. G. Collins have not, nor have nor has any of the defendants paid the same.

And the plaintiffs claim $2000.

Plea: that the said deed was made subject to a condition therein contained, that the said deed should be ineffectual unless and until completed and agreed to by all the creditors of the said David Collins and W. G. Collins having claims for over $100. And the said defendants allege that certain creditors of the said David Collins and W. G. Collins having claims for over $100, to wit, one John Macdonald, and one Samuel Henry, and one James A. Macpherson, refused and still refuse to complete or agree to the said deed, although requested so to do.

Replication: that the said John Macdonald and Samuel Henry were not parties to said deed, and that the said condition only applied and was only intended to apply to creditors parties thereto, all of whom duly completed and agreed to the same.

Rejoinder: that the said deed is in the words and figures following:

INSOLVENT ACT OF 1875, AND AMENDING ACTS.

This Indenture, made this 28th day of August, A.D. 1878, between David and W. G. Collins, both of the village of Kincardine, in the county of Bruce, merchants, hereinafter called the insolvents, of the first part; Robert Baird, James LeGear, I. J. Fisher, John Fisher, Robert Reed, Frank Collins, T. J. Stewart, Robert Walker, William Collins, all of the village of Kincardine, aforesaid, hereinafter called the sureties, of the second part; and the several persons, firms and corporations who are creditors of the parties of the first part, and who are mentioned in the annexed list, of the third part.

Whereas, the parties of the first part are insolvent and unable to meet their engagements in full, and they have agreed with their said creditors for a composition at the rate of 75 cents in the dollar.

Now, therefore, this Indenture witnesseth, that, in consideration of the premises, the said parties of the first part hereby covenant and agree with the said creditors, and each of them, that they will pay to them, and each of them, a composition at the rate of 75 cents in the dollar, in two equal payments, in four and six months from the date hereof, without interest, and will pay to Messrs. Gault Bros. & Co. the sum of $100, to cover solicitors' and other expenses. And the said sureties hereby guarantee payment of the said composition, and hereby agree to endorse the notes to be given to each creditor to receive the due payment of the said composition. And the said sureties, in consideration of the premises, hereby agree between each other that they are sureties in proportion to their present liabilities as bondsmen on the several bonds given by them to secure a former composition of the parties of the first part. And the said creditors, in consideration of the premises, hereby release, acquit, and discharge the insolvents from each and every claim against them, save and except such claims as are already secured, which are not

intended to be affected; but this deed only applies to debts incurred since the last insolvency.

This deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

Demurrer on the ground that the said rejoinder shows that the said condition only applied, and was only intended to apply, to creditors parties to the said agreement, and in fact confesses the truth of the said rejoinder.

The demurrer was argued before Mr. Justice Osler, sitting alone, on June 10th, 1879.

Gibbons, for the plaintiffs.

H. J. Scott, for the defendants.

The arguments were substantially the same as those urged on the appeal.

June 24th, 1879. OSLER, J.—It must be assumed, on these pleadings, that when the sureties executed the deed there was a list or schedule of creditors attached to it, upon whose debts the insolvents agreed to pay a composition guaranteed by the defendants. The parties of the third part are not "Such of the creditors as shall hereafter execute the deed," but "The creditors who are mentioned in the annexed list."

It is to "the said creditors" that the insolvents agree to pay the composition, and it is the "said composition" of which the defendants guarantee payment, and the notes to be given for which, to each creditor, they agree to endorse. It was argued that "each creditor" must mean every creditor or all creditors of the insolvents, but it is quite plain that it means each of the said creditors to whom it had been already agreed that composition notes should be given. It was also argued that there was nothing in the deed which would warrant me in giving a less extended meaning to the words "all creditors" than they bear in themselves and is attributed to them in the plea; but if

a creditor not named in the list or schedule attached had come in and desired to execute the deed, could not the surety have said to him, you are not one of these creditors whose debt I agreed to guarantee—you were not in the schedule?

But the defendants further contend that, under the condition at the end of the deed, "This deed shall be ineffectual unless and until completed by all creditors having claims for over $100," they are entitled to take advantage of the fact that other than scheduled creditors have not come in and accepted the deed. I see nothing in the deed to give the word creditors in this clause a more extended meaning than it plainly has in the earlier part of the deed. It does not profess to be made in pursuance of the Insolvent Act, although the words "Insolvent Act of 1875, and Amending Acts," are found at the top, nor is there anything in the Act to make such a deed as this unjust or unfair to other creditors. They are not affected by it, and it does not interfere with the insolvents' property in any way.

If the benefit of the deed is confined to scheduled creditors alone, its non-execution by other creditors cannot affect the sureties further than that it leaves it in the power of other creditors to collect their debts from the insolvents in full; but this was a matter for the defendants to consider when they assented to the terms of the deed.

Judgment for plaintiff on demurrer to rejoinder, and for defendants on demurrer to surrejoinder.

The defendants appealed.

The appeal was argued on the 11th September, 1879 (a).

H. J. Scott, for the appellant. The condition in the deed sued on, that it should be ineffectual unless and until completed by all creditors having claims for over $100, is an absolute stipulation in regard, not only to the creditors parties to the deed and mentioned in the schedule, but also to all other creditors, and it cannot be confined to such

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Present.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

creditors only as were parties to the deed. The terms of a contract should be construed according to their plain literal meaning, unless such construction involves some manifest inconsistency or absurdity: *Great Western Ry.* v. *Rous*, L. R. 4 H. L. 650; *Caine* v. *Horsfall*, 1 Ex. 519; *Mallan* v. *May*, 13 M. & W. 517; *Robertson* v. *French* 4 East, 135. Construing the words of the condition strictly does not in any way clash with any other portion of the agreement, it being merely a stipulation as to the circumstances under which the agreement should come into force. In both the other places in the deed in which the word "creditors" is used, it is preceded by the word "said," and the substitution of the word "all" for the word "said" shews that the two expressions do not apply and were not intended to apply to the same class; and "all creditors" should not be construed as equivalent to "all such creditors:" *Coxhead* v. *Mullis*, L. R. 3 C. P. D. 442. If the condition applies only to creditors parties to the deed it is useless, as the deed would not without it come into operation until executed by them. The fact that the agreement was headed "Insolvent Act of 1875, and Amending Acts," shews that it was the intention of the parties to enter into an agreement which would require the consent of all the creditors of the insolvents, and they could not have intended to bind themselves absolutely to pay a composition to certain creditors without knowing what course the other creditors would take.

Gibbons, for the respondent. The rule is, "that in order to put a just construction upon the language of any document, the Court must read the whole of it, and must determine the meaning of the words employed in the passage under discussion, not only by a careful examination of the immediate context, but also by considering the sense in which the same words have been used in other parts of the instrument. For it is obvious that the language of a particular passage may be capable of bearing a wider or narrower signification, when read in connection with other parts of the instrument where the same language is

employed, than it would have borne had no such reflected light been thrown upon it": *Taylor* on Evidence, 7th ed., sec. 1128, p. 941, and cases cited. Taking the rule laid down by the appellant, it would be inconsistent and absurd to hold that the proviso contemplated the execution of the deed by creditors who were not parties to it nor referred to in the same, and who could neither participate in any benefits nor would their execution of the deed bind them in any way. The deed is made only with the "creditors who are mentioned in the annexed list," it does not purport to be with creditors generally. It is clear that it was not intended to operate under the Insolvent Act, as otherwise the proviso would be illegal, for, under the Insolvent Act, only a majority in number and three-fourths in value are required to complete. This is further shewn by the fact that it does not provide for and is not made with creditors generally. The agreement is only as to a specific class of debts held by specific creditors, viz., "debts incurred since the last insolvency," and the release is by "the said creditors" as to such debts. In the covenant by the defendants the creditors are not spoken of as "the said creditors," although no others could be intended, but the agreement is with "each creditor," and the proviso is not more general, "all creditors over $100," clearly meaning all such creditors as were intended to execute it. It is necessary to refer to the context to find out the meaning of the proviso, as standing alone it would be uncertain whose creditors were intended to execute, but it is clear, on a reading of the whole document, that all creditors meant all creditors referred to in the deed as agreeing to the composition, and these were the specific creditors with whom the deed was made.

December 1, 1879. MOSS, C. J. A.—The deed which we have to consider upon this appeal seems to be somewhat loosely drawn. I was at first under the impression that it ought to be read in the light of the provisions of the Insolvent Act relating to compositions, but subsequent con-

sideration has produced a change in my view. It has the caption " Insolvent Act of 1875 and Amending Acts," but I have no doubt that its presence is due to a printed form having been either used or taken as a model. The question presented for adjudication is, whether creditors named in the list annexed to the deed can maintain an action, although the deed was not assented or agreed to by certain creditors, who, however, were not mentioned in such annexed list. The pleadings are not very aptly framed for raising this question, but it was agreed that this was the real matter in controversy. The deed purports to be made between the insolvents of the first part, the sureties of the second part, and the persons, who are creditors of the insolvents and who are mentioned in the annexed list, of the third part. According to the natural and obvious meaning of this language, the parties of the third part are creditors named in a list actually annexed to the deed when the sureties became bound. No authority to add creditors to the list after execution by the sureties could be implied by law. If such authority existed, it must be derived from the express terms of the instrument itself. Then follows a recital that the parties of the first part were insolvent and had "agreed with their said creditors" for a composition. The *said* creditors would seem obviously to be those mentioned in the annexed list. Then comes the operative part of the deed which is a covenant by the insolvents to pay " the said creditors " the composition, and a guarantee of payment by the sureties, who also agree " to endorse the notes to be given to each creditor to receive the due payment of the said composition." There is no reasonable ground for disputing that by " each creditor " is meant each of the creditors to whom the insolvents had agreed to pay the composition, that is, each of those named in the list. There is next an agreement between the sureties that their liabilities *inter se* are to be measured by those they had previously incurred on bonds given to secure a former composition. The next clause is a release by the creditors, concluding with the words " but this deed

only applies to debts incurred since the last insolvency." This is not very happily expressed, but I take it that the object of the draftsman was to exclude the contention that the former composition was affected by this instrument. Lastly, there is the condition, upon which the present contention is built, that the deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars. It certainly is not easy to conjecture what led to the adoption of this peculiar phraseology. But taking the words as we find them, I do not think that their fair interpretation is, that all creditors having claims over that amount must give their assent. The previous analysis of the language shews, in my opinion, that the agreement looked only to the creditors named in the list. This condition, therefore, only requires the assent of such of *these* creditors as had claims for more than one hundred dollars. It bore no reference to other creditors, whose claims might have been arranged in a different manner. It did not include all creditors, because it left untouched claims arising before the previous insolvency, and dealt with by the previous composition. It might be unsafe to refine upon the strict meaning of any word employed in an instrument so loosely drawn, but it is not without its significance that the creditors upon whose action the deed was to receive vitality were those who had power to complete. None could complete but those who could be parties, and they were confined to those mentioned in the list.

I think that the construction placed upon the instrument by Mr. Justice Osler is correct, and that the appeal should be dismissed, with costs.

BURTON, J. A.—I am of opinion that the judgment appealed from is correct, and should be affirmed.

So soon as it is established that this deed was entered into with a certain class of scheduled creditors, any supposed difficulty arising from the apparent generality of the last clause of the deed, in my opinion, ceases.

What reason is there then for contending that the words

of this deed describing the parties of the third part, viz. "the several persons, firms and corporations who are creditors of the parties of the first part, *and who are mentioned in the annexed list*," should be read as if those I have italicised had been omitted, or as if they were read "who are or may hereafter be mentioned in the annexed list."

It is clear to my mind that the deed must be read as if certain creditors were named in the schedule at the time the deed was executed by the covenantors, and the case is then precisely the same as if these creditors had been referred to *nominatim* in the body of the instrument as the covenantees. They, and they only, were the parties intended to be benefited, and to them only was the covenant intended to extend.

The recital, then, refers to an agreement having been made, not with their creditors generally, but with the creditors whose names are set forth in the schedule; the covenant is with them, and each of them, and the release from the same creditors saving their securities, and then comes the clause which has created the difficulty, which is in these words: "This deed shall be ineffectual unless and until completed by *all* creditors having claims for over $100."

It is clear, also, that there were other creditors whose claims were still unsatisfied under a previous insolvency; but then it is expressly declared that the deed does not apply to them.

The only creditors then intended to be benefited by this deed were those specifically named in the schedule which formed a part of it, and it is a well recognized rule of construction that where a particular class of persons is spoken of and general words follow, the first class mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class: *Lynden* v. *Standbridge*, 2 H. & N. 51.

But there is another strong reason against the construction contended for by the appellant. The words are not that

the deed shall not be operative until assented to by all the creditors having claims over $100, but until completed by such creditors—that is, completed by execution; but no creditor except those mentioned was a party, or had a right to become a party to or execute the deed, and it is clear, therefore, that the clause had reference only to such creditors as were named in the schedule.

The restriction in that portion of the deed, descriptive of the parties to it, extends to the whole instrument, and, like the preamble to an Act of Parliament, is the key to what comes afterwards.

The replication would appear, if correctly copied in the appeal book, to be no answer to the plea, which, in addition to the two creditors named in the replication, alleges that one MacPherson had refused to complete the deed, and the replication contains no answer as to him. I assume, as it was not referred to on the argument, that this is a clerical error.

The appeal should, in my judgment, be dismissed with costs.

PATTERSON, J. A.—I have very carefully endeavoured to find in the composition deed before us some satisfactory reason for adopting one or other of the constructions suggested, and have failed. I should not find much difficulty in adopting that on which the plaintiffs rely if I could only receive, as at all decisive, the views most strenuously urged by their counsel as well as put prominently forward in the reasons against the appeal, viz., that the description of the parties of the third part, as "the several persons, firms, and corporations, who are creditors of the parties of the first part, and who are mentioned in the annexed list," excluded all creditors but those who were on the list at the date of the instrument or when it was executed by the defendants. I cannot take this as conclusive. I do not think that is the necessary effect of the use of the present tense, "are mentioned", &c., when read in connection with the express provision that the deed shall not be effectual

until a later date. The grammatical difficulty of including in the description all creditors who may have executed before the time when, by its terms, the deed is first to become effectual, does not seem at all formidable. We are all familiar with a common mode of executing deeds of this kind, in which the schedule of creditors is merely the sheet of signatures as executed by those who assent. To my apprehension this description of the parties of the third part would be satisfied by a deed of that kind. Thus it appears to me that the argument that the execution of the deed by the creditors whose non-assent is pleaded would be futile because they are not parties to the deed, proceeds in a circle. It is clearly not aided by the references to the "said creditors and each of them," because whatever flexibility belonged to the language of the description must necessarily attach to these words also. Of course the *said* creditors are the parties of the third part, but that leaves the question just where it was. Then one is apt to expect a deed of composition to provide for all creditors or shew why any are excluded. This one guards against being construed to include debts already compounded for, or in fact any incurred before a certain date, viz., the last insolvency, but does not contain a word to suggest an intention to exclude individual creditors or classes of creditors.

There are thus pretty strong reasons, and those I have mentioned are not the only ones, for acceding to the defendants' contention that the parties meant exactly what they said, when they declared that the deed should not be effectual unless and until completed by *all creditors* having claims for over $10C. I think I should have so treated the contract if I had been dealing with it in the first instance. But although the inclination of my opinion is in that direction, I cannot say that that construction is so clearly indicated by the whole document as to require us to reverse the decision of the Court below. There is no doubt that the language is fully capable of the effect there attributed to it; and having regard to this,

and also to the circumstance pointed out by the learned Judge, that the deed does not dispose of the estate of the insolvents, and that even if the estate were pledged to secure the sureties who guarantee the payment of a partial or unequal composition, such a disposition of it might not stand as against unsatisfied creditors, who, therefore, are not defrauded; while the sureties, if they look to it for their indemnity, should have been careful to protect themselves by a less loosely drawn instrument; I agree, though not without hesitation, that it is our duty to dismiss the appeal.

MORRISON, J.A., concurred.

Appeal dismissed.

MUNRO ET AL. V. SMART ET AL.

Will—Construction of.

The testator devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried, and upon her marriage the whole to be divided between her and her four sisters; but if she died unmarried the division was to be amongst her four sisters; and in case of either of these four dying before the marriage or death of C. the share of the one so dying was to go to the children. Then followed a provision that in case of the death of any of her *said* daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters and the children of deceased daughters.

Held, reversing the decree of the Court of Chancery, 26 Gr. 310, that it was the intention of the testatrix that there should be a distribution of the estate upon the marriage of C., and that on that event happening each of the daughters took an immediate absolute interest.

THIS was an appeal from the judgment of the Court of Chancery affirming the decree of Spragge, C., 26 Gr. 310. The facts are fully stated there.

The appeal was argued on the 22nd November, 1879 (*a*).

Crooks, Q. C., and *Cattanach*, for the appellants. The decree, in limiting the interests of the four daughters to a life-estate, is contrary to the intention of the testatrix, as expressed by the words used in her will, and consequently affords no room for the application of any such technical rule of construction as was applied by the learned Chancellor in his judgment. The principle to be collected from the cases in the House of Lords, relied upon in support of the decree of *O'Mahony* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, *Ib.*, p. 408, that the limitation applies to death at any time without children, has no application, except where there is a complete absence of any contrary intention. The intention of the testatrix is clearly expressed that Catharine McGill should enjoy the income of the whole property until her marriage or death, which ever should first happen, and that on either event there should be a division of the corpus; in case of the marriage

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

of Catharine, amongst her and her four daughters; and in case of her death, amongst the others; and that it was to meet the contingencies mentioned of the death of any of these four daughters before the marriage or death of Catharine, (which first happened,) that the provisions in that behalf were made by the testatrix. The construction placed by the decree on the will is directly contrary to the expressed words of the will, and defeats its plain intention.

The true principle of construction, as now established by the decisions, is, that no technical rule or canon is to be resorted to, unless there is a total absence of any intention of the testator to be collected from the language of the will and surrounding circumstances. *Olivant* v. *Wright*, L. R. 1 Chy. Div. 348, and *Besant* v. *Cox*, L. R. 6 Chy. D. 604, explain the limited extent of the two cases in the House of Lords, and are decisions strictly governing the present case, and should have been followed by the Court of Chancery. The decision in *Gould* v. *Stokes*, 26 Gr. 122, is also in accordance with the argument of the plaintiffs in the case, while that of *Holmes* v. *Wolfe*, 26 Gr. 229, presents an illustration of the distinction. When the intention of the testator is expressed or to be implied from the words used, there is no place for the application of any supposed technical rule: *Grieve* v. *Grieve*, L. R. 4 Eq. 182; *Hutchinson* v. *Tenant*, L. R. 8 Chy., D. 542. Moreover, the clear rule of law is that in the absence of a contrary intention expressed in the will, it is to be implied that the testator intended that the vesting should take place at the earliest period, *i. e.*, at the time of the first possible division.

Boyd, Q.C., and *C. Moss*, for the repondent. If the fourth rule, in *Edwards* v. *Edwards*, 15 Beav. 357, were still an authority the construction contended for by the appellants would be correct, but that rule has been superseded by *O'Mahony* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, L. R. 7 H.L. 408. The general intention of the testatrix, as disclosed in the will, was to preserve the property in her family; and with this view, to provide that, in the event of any of her daughters dying childless at any period, the

share of such daughter should go to the other members of the testatrix's family. In dealing with the contingency of any of her other daughters dying before the marriage of Catharine, the testatrix speaks of the share which such daughter "*would have been entitled to had she survived*;" while in dealing with the contingency of any of her daughters dying childless, she speaks of such daughter's "*share*," shewing that a different period, and one at which the share was ascertained and vested, subject to be divested, was contemplated by the testatrix. It is sufficient in order to support the substance of the decree that the will should give to every daughter alive at the date of the marriage of Catharine a share vested, but subject to be divested in the contingency of her dying childless, and the will is capable of that construction: *Cotton* v. *Cotton*, 23 L. J. Chy. 489; *Theobald* on Will, 338, and the cases there cited.

December 1, 1879. MOSS, C. J. A.—By the decision complained of, the Court of Chancery has held, that upon the proper construction of the will of Mrs. Mary Crooks, her five daughters became, on the marriage of Catharine (afterwards Mrs. Smart), each entitled to an equal share of the estate of the testatrix for life only, and that the children of any of the daughters who may survive their mother are absolutely entitled to the share represented by her, and that in the event of any of the daughters dying without leaving any child, the share represented by her shall become absolutely vested in the living daughters and the children of deceased daughters. In that construction we are unable to concur.

We agree with the learned Chancellor, before whom the cause was originally heard, and whose judgment was affirmed by the full Court, that the doctrine laid down by the Master of the Rolls, which has acquired the name of the fourth rule, in *Edwards* v. *Edwards*, 15 Beav. 357, has been overturned by the House of Lords in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, and *Ingram* v. *Soutten*, L. R. 7 H. L. 408. Indeed, it may well be doubted

whether the Master of the Rolls intended to lay down so strict a rule of construction as has been supposed. For example, as was pointed out by Lord O'Hagan, he observed in the subsequent case of *Gosling* v. *Townshend*, 17 Beav. 245, 247: "Where a period of distribution is fixed, and the testator speaks of a death previous to that time, the death thus spoken of as a contingency must refer to that period of distribution. But if a testator gives a legacy to A., but if A. die without leaving issue, then to B., to what period can that be referred except to the whole period of A.'s life?"

Long before the decisions of the House of Lords authorities may be found which seem to shew that, in the opinion of eminent Judges, there was no such absolute canon of construction as was supposed to be laid down in this fourth rule. For example, in *Cooper* v. *Cooper*, 1 K. & J. 658, Vice-Chancellor Page Wood held that the testator's children were entitled to life interests only under a bequest of personalty between his four children, who were named, to be equally divided between them, share and share alike, and in case of the death of either of the said four children leaving issue, then the issue to take the parent's share; but in the event of their dying without leaving issue, then the share or shares of the one so dying to form part of the residue. He then pointed out the distinction between such a bequest and a gift to A., and in case of his death to B. In the latter some event must be assumed to have been in the testator's mind as fixing the period within which he contemplated the possibility of the legatee's death, as nothing could be more certain than that he must die at some time or other; and the will pointing to no other event, the testator's death has been selected as the most natural to assume. But, as in the particular will which he was construing, each of the phrases importing a contingency could be referred to a contingency of its own, namely, to that of leaving issue or that of not leaving issue, he held that the necessity for supposing the testator meant a death during his own lifetime did not arise. In other words, the

learned Judge examined the whole terms of the will for the purpose of ascertaining its intention. A similar mode of treatment was applied to the will in *Gosling* v. *Townshend*, when it came before the Lord Chancellor and Lords Justices in Appeal, 2 W. R. 23. These views are quite in conformity with the doctrine of *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, which, as I understand it, is that *primâ facie* the words introducing a gift over, in case of death without children of a previous taker, indicate death occurring at any time, and that this ordinary and literal meaning is not to be departed from except in consequence of a context which renders a different meaning necessary or proper.

In *Besant* v. *Cox*, L. R. 6 Ch. D. 608, Malins, V. C., stated the effect of the decision to be, that wherever there is a gift in fee, with an executory devise over upon the death of the first taker without issue, that gift over will take effect at the death of the devisee, unless a contrary intention appears; but if upon the whole will the Court collects a contrary intention, it leaves it entirely open to the Court to put a construction upon it which will carry into effect the obvious intentions of the testator.

In *Ingram* v. *Soutten*, L. R. 7 H. L. 408, Lord Cairns explained that if what is termed the fourth rule in *Edwards* v. *Edwards*, 15 Beav. 357, was meant to be laid down as a rule of construction, without regard to expressions in the particular will requiring such a construction, he was unable to accede to a rule the effect of which would be to alter the natural meaning of words; and he then used the following language, at p. 416, which shews clearly the method of interpretation which should be adopted: "I can find nothing whatever in the context, or in the general scope of the provisions of this will, which leads me to think that the words pointing to the death of Mary Soutten, without issue living at the time of her death, are to be construed as pointing to her death otherwise than as at whatever time it may occur."

But it appears to us that it was a misconception to suppose that if the fourth rule had been ever so

firmly established, it had any application to the construction of this will in the event that has occurred. That rule dealt with the case where a previous life estate had been given to one person, and on the determination of that estate there is a gift to A., with a direction that if he shall die, leaving no child, then over. Here Catharine married, and the case which the Court has to consider is not that of the distribution of the property upon the termination of an estate expressly given for life only to the first taker. It may also be noted, that where the Court is examining the context and the general scope of the will, there is nothing in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, in disapproval of the leaning which the Courts have manifested toward putting such a construction on the gift over as will interfere as little as possible with the prior gift, where it appears to be absolute in the first instance, and is followed by a gift over in a particular event.

What then is the intention to be collected from the whole will? Is it that upon the marriage of Catharine there shall be a distribution once for all, and an absolute vesting of interests, or is it that upon the death of each daughter, whenever it happens, there shall be a fresh distribution? The latter construction involves consequences so inconvenient and anomalous, that it should only be adopted if the language used is so strong and clear as to leave no choice. But instead of finding such language in this will, its whole scheme appears to us to exclude that view. It is carefully and precisely drawn, and seems to have been framed with a view to providing for every contingency that might occur. The property is bequeathed to the executors, upon trust to hold the residue, after payment of debts and charges, for the benefit of Catharine as long as she should remain unmarried, so that she might receive the interest, dividends, and profits. The will then expressly declares that upon her marriage the property should be equally divided between her and the four married daughters. If the will stopped at this point it would be perfectly clear that each of the daughters in the event of

marriage, which happened, took an immediate absolute interest. Nothing would have remained to be done by the executors but to make an equal distribution, and they would then have been completely and finally discharged from their trust. The question therefore is, whether there is anything in the remaining dispositions of the will to qualify this absolute interest in each and reduce it to a mere life estate. Up to this point the testatrix had provided, and effectually so, for the distribution of her estate in the event of the marriage of Catharine. She then turns her attention to the next most obvious possibility, that of the death of Catharine unmarried, in which case the property is to be equally divided between her other daughters. If that event had occurred, it is perfectly plain that there would have been an immediate division, and an absolute vesting in her four married daughters, if they were then alive. A complete disposition of the property had thus been made with relation to two periods of distribution, namely, the marriage or death unmarried of Catharine, providing that all the married daughters were then alive. But it might happen that they, or some of them, would die before her death or marriage, and any daughter so dying might either leave issue or be childless. With each of these contingencies the will then proceeds to deal. It firstly declares that in case of the death of any of the married daughters before the marriage or death of Catharine, the children should take the share to which their parent would have been entitled if she had survived. If it were necessary to examine the language of the will critically, it might here be noted that the terms employed indicate that the mother would have had an absolute interest in her share, if she had survived her sister. It then deals with the sole remaining contingency, by providing for the case of the death of any of her "*said* daughters" without leaving issue. As a mere matter of grammatical construction, "said daughters" would be equivalent to its last antecedent—her married daughters, and the period of death to which the clause referred would

be taken to be the same, namely, the marriage or death of Catharine. But the strong, clear, and unmistakable point is, that this interpretation completes the scheme of the will, makes it consistent and rational, and frees it from the imputation of inconvenient, if not absurd, consequences. In our opinion, it is sufficient for the determination of this appeal to say that the whole scope of the will plainly indicates one final distribution of the estate, and that the details adequately and intelligently provide for the mode of distribution according to the possible condition of the descendants of the testatrix, when that period arrives.

Without occupying time by any further reference to decided cases, we may add, that in the judgment of the Court of Appeal in *Olivant* v. *Wright*, L. R. 1 Ch. D. 348, very strong support may be found for the views we have expressed.

The only answer attempted to this reading of the will is, that the testatrix designed to keep her property in settlement; but, to say nothing of the absence of any indication of such an intention in the will itself, this is silenced by the fact that she had herself contracted for its sale, and that at her death it had been converted into personalty.

The appeal must be allowed, but it appears to be proper that, under the circumstances, the costs of all parties should be borne by the estate.

PATTERSON, J. A.—In *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, Lord Cairns, after examining the cases on which the Master of the Rolls had relied in *Edwards* v. *Edwards*, 15 Beav. 357, as authorities for the rule laid down by him in that case, concludes that branch of his judgment with the following passage: "I am unable to find in any case prior to *Edwards* v. *Edwards*, 15 Beav. 357, any authority that the words introducing a gift over, in case of the death, unmarried or without children, of a previous taker, do not indicate, according to their natural and proper meaning, death, unmarried or without children, occurring at any time, or that this ordinary and literal meaning is to be

departed from otherwise than in consequence of a context which renders a different meaning necessary or proper." I take this to express the principle to be observed in the construction of the will before us. It is a principle of very wide application, whatever be the nature of the instrument which has to be construed. It is the same rule which was expressed by Blackburn J., in *The Queen* v. *Castro*, L. R. 9 Q. B., at p. 360, in these words: "In construing all writings it is a general rule that we are to understand the words used in their technical sense, if they have acquired one, or, if not, in their ordinary sense, unless there be something to shew that they are used in some secondary sense." The decision of the House of Lords in *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, freed the construction of wills from the restrictive rule said to have been laid down in *Edwards* v. *Edwards*, 15 Beav. 357, not to impose another rigid rule in its place, but to place it under the law which applies alike to statutes, wills, contracts, and all other instruments; and requires us to give to their language its plain and grammatical meaning, unless that meaning is controlled or modified by the context.

The will now before us provides, in the first place, for the event of Catharine being alive and unmarried at the death of the testatrix, an event which happened. Catharine was to receive, while she remained unmarried, the interest, dividends, or profits, arising from the whole estate. The testatrix then proceeds to provide for the distribution of the estate in the event of the marriage of Catharine, or of her death unmarried. The testatrix had four other daughters, all of whom were married. If Catharine married while the other daughters were all alive, each of the five daughters was to take one-fifth of the estate. If Catharine died unmarried, the other four being still alive, each of those four was to take one-fourth of the estate. There remained two other events to provide for. At the death or marriage of Catharine the other daughters might not all be alive. One or more of them might be dead, and either (1) those dead might all have left children; or (2)

one or more might have died leaving no children or child *surviving.*

It is manifest that these events must have been in the mind of the testatrix. She was looking to the time when, by reason of the death or marriage of Catharine, the provision originally made for her support, while unmarried, was to cease, when there would no longer exist any reason for placing her on a different footing from the daughters who were already married; and when her evident purpose was that the estate should be divided, each daughter taking her portion, or, if all were not alive, the children of such of the deceased as had left children, who were alive at the distribution, taking the share which their mother would have taken.

The provision accordingly is, that (1) if any of the married daughters had died before the death or marriage of Catharine, leaving children, the children were, upon the division of the estate, to take the share their mother would have taken if she had survived—which share would be (assuming that none of the daughters had died childless, which is the case dealt with in this clause) one-fifth, if the distribution were on the marriage of Catharine, or one-fourth if it were at her death; and (2) if any of them had died without leaving any child surviving, then the share of such daughter so dying childless should be divided among the surviving daughters and the children of the deceased *per stirpes*, and not *per capita*—the effect being, instead of the distribution into fourth parts or fifth parts, which would take place in case all survived, or all who died left children, the shares were to be reduced in number and increased in amount. This provision was necessary to the symmetry of the scheme of distribution; without it there would have been one obvious contingency left unprovided for, namely, that of one of the married daughters dying childless while Catharine was still alive and unmarried.

This reading of the will seems to me to give the natural effect to the language used, read, as it must be read, in the immediate connection in which we find it, and bearing in

mind that only one distribution is pointed at: a distribution plainly intended to be made by the trustees, whose trust was discharged as soon as that distribution was made. It is possible that the expression, "dying childless," is not very accurate. No doubt the clause covers the case of the death of any one of the daughters without having borne children, or whose children had died before her. But I think the situation provided for is the absence of children living at the period of distribution. I take that to be the force of the phrase, "leaving children surviving." The children of any deceased daughter were to take the share their mother would have taken if she had *survived*—plainly meaning if she had been living at the distribution; and when the death of one without *leaving* any children or child *surviving* is immediately afterwards spoken of, I understand the word *surviving* to mean, as before, living at the particular period, not merely outliving the mother. It is only in this sense that the word strikes me as having any force at all. Unless this is its office, it is mere tautology. There is thus added another ground for reading this clause, like the preceding ones, as referring to the one period of distribution.

BURTON and MORRISON, JJ.A., concurred.

Appeal allowed.

MAXWELL V. THE CORPORATION OF THE TOWNSHIP OF CLARKE.

Highway—Neglect to keep in repair—R. S. O. ch, 174, sec. 491.

On one side of a travelled road which the defendants were bound to keep in repair was a declivity, down which a pile of wood, composed of blocks cut in two feet lengths, had been thrown by a person living near the highway. Some of the wood was upon the bed of the road, but a portion, estimated at from 21 to 26 feet, was free from obstruction, and the road itself was not defective. The plaintiff's horse in passing shied at the wood, threw him off, and injured him.

Held, reversing the judgment of the County Court, that the defendants were not guilty of a breach of the statutory duty imposed upon them by R. S. O. ch. 174, sec. 491, to "keep in repair," and they were therefore not liable.

THIS was an appeal from the County Court of the United Counties of Northumberland and Durham.

The action was brought to recover damages for an injury sustained by the plaintiff in consequence of his horse having taken fright in passing a pile of firewood, which was on the side of the highway. The jury found a verdict for the plaintiff for $200. Afterwards a rule *nisi* to set aside the verdict and enter a nonsuit, or for a new trial, was discharged, and the defendants appealed.

The facts are fully stated in the judgment below.

The appeal was argued on the 12th of November, 1879 (*a*).

E. Douglas Armour for the appellant. The learned Judge of the County Court asked three questions, upon the answers to which his decision depends. A fourth should have been asked, viz., whether the evidence shewed that the wood pile was indisputably the cause, actual and proximate, of the accident? It is immaterial only if the first question be answered in the negative, and it is submitted it should be. The road clearly was not out of repair. Rural municipalities are not so stringently bound as more crowded municipalities are: *Hutton* v. *Corporation of Windsor*, 34 U.C.R. 496. For the wants of the inhabitants for whom the highways are held in trust are sufficient reason for a liberal

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

interpretation of the statute: *Castor* v. *Corporation of Uxbridge*, 39 U. C. R. 125. The roads are for the convenience of the people, and, notwithstanding that the people use them as necessity constrains and convenience prompts, the municipality will have fulfilled their trust by having first made the highways reasonably passable. The evidence should shew that there has been a clear dereliction of duty, or that the appellants unreasonably omitted to fulfil their statutory requirements. The plaintiff, to sustain his case, must shew a neglect of a general performance of duty: *Boyle* v. *Corporation of Dundas*, 25 C. P. at pp. 425, 426. Here the act complained of is an isolated act, and that, too, of a stranger, for which the appellants cannot be held responsible. Compare *Burns* v. *Corporation of Toronto*, 42 U. C. R. 560. It would be beyond their ability for the corporation to discover and remove every pile of wood on the sides of the roads over a large tract of land like a township, and they are, therefore, not called upon to do it. The road itself was perfectly clear, and the construction or repair of the actual roadway is not complained of. *Ralph Stutt*, a witness for the defence, said, on cross-examination: "Three teams passed abreast; my team was unloading; a man drove another team and came up and talked to me, and another team went by while we were standing." This distinguishes the present case from *Castor* v. *Corporation of Uxbridge*, 39 U. C. R., 125, where the telegraph poles were on the travelled portion of the road; and from the words used by Harrison, C. J., at p. 127 of the report, where he says: "So far as we can see, there was plenty of room for the placing of the poles without at all encroaching upon the travelled part of the road." It may be inferred, that if the poles had been on the side or untravelled part of the road, there would have been no grounds for holding that the road was therefore out of repair. And, again, the same learned Judge said, in *Lucas* v. *Corporation of the Township of Moore*, 43 U. C. R. 339, 340: "It would not be reasonable, in this country, to expect municipal corporations to keep the sides of the road in the

same state of repair as the travelled way." In the present case, the preponderance of evidence shews that there was no obstruction to persons lawfully using the highway. Not being a physical obstruction, it could only be complained of as an object of danger. The only evidence of this is, that the horses of several of the plaintiff's witnesses shied at the woodpile without accident, and the *opinions* of other witnesses that it was a place of danger: *Bateman* v. *City of Hamilton*, 33 U. C. R. 250. Even supposing it were such an object as a horse would shy at, it is not *per se* such an obstruction as constitutes non-repair, so as to make the appellants liable: *Castor* v. *Corporation of Uxbridge*, 39 U. C. R. 126. If there be any doubt, a new trial should be granted, as in *Boyle* v. *Corporation of Dundas*, 25 C. P. 420; but we submit that the rule should be made absolute for a nonsuit.

J. K. Kerr, Q. C., and *D. B. Simpson*, for the respondent. The road was out of repair by virtue of the presence of the wood upon the side, which encroached to a certain extent upon the travelled portion. The evidence of one of the witnesses shews that he drove over some sticks of wood, and had to jump out of his cutter to avoid an upset. As long as the wood lay upon a part of the road which might be driven or ridden upon, the municipality are liable for negligently allowing it to remain there. Even though it may have been originally placed there by a stranger, the municipality must be said to have adopted the wrongful act of the stranger, and to have made it their own, by allowing the obstruction to remain after notice. There is sufficient evidence of notice to the corporation to bring home the state of affairs to their knowledge, and fix them with the responsibility, for it is shewn that Renwick, a member of the council, passed there frequently, and he also swore that two other members of the council must have known of it. They cited *Burns* v. *Corporation of Toronto*, 42 U. C. R. 560; *Macdonald* v. *South Dorchester*, 29 C. P. 249; *Adair* v. *Corporation of Kingston*, 27 C. P. 126; *Boyle* v. *Corporation of Dundas*, 27 C. P. 127; *Lucas* v. *Corporation of Township of Moore*, 3 App. R. 632.

December 1, 1879. PATTERSON, J. A., delivered the judgment of the Court.

The facts shewn by the evidence, and the questions chiefly contested in the Court below, are so well stated by the learned Judge in his very careful and able judgment, that I cannot do better than extract his statement of them, which is as follows:—

"The facts of this case as proved at the trial may be shortly summed up thus:—The plaintiff was riding on a horse, generally quiet, along a much-travelled road, under the charge of the defendants, and which it was their duty to keep in repair. The road, from the fact of there being a declivity on one side of it, had only a width of from 21 to 22 feet on which it could be travelled. This portion of the road was partly encumbered at the time by an uneven, awkward-looking pile of wood, cut in two feet lengths, and twenty feet or more long, thrown in a heap down the declivity, but occupying from two to four feet of the travelled part of the road, and about the same measurement in height. In passing this obstruction when going from his home the plaintiff's horse shied, but no accident then occurred; on returning home hours later, at dusk in the evening, at a slow canter, but holding a tight rein as a precaution, the horse suddenly shied again and threw the plaintiff off, by which accident his shoulder was dislocated. The obstruction on the road had previously frightened the horses of several other persons; it had lain on the road about three weeks. A member of the corporation, who was called as a witness, was in the habit of passing it, and saw it before the accident. Upon these facts, which I have given according to my view of the preponderance of the evidence, there are three questions for consideration:

"1st,—Was the obstruction which caused the accident, of such a nature that its presence rendered the road out of repair, within the meaning of the Municipal Act.

"2nd,—Was there sufficient evidence of notice to the defendants, constructive or direct, to make them liable in consequence of their neglect to have the obstruction removed; and

"3rd,—Was there such negligence on the part of the plaintiff as to make his conduct so contributory to the accident as to preclude his right to recover.

"So little was said on the first point in the defence, or on this application, that it may almost be said that the case has hardly been disputed, except on the grounds of want of notice, and contributory negligence on the part of the plaintiff. The general liability of the defendants involved in the first question would, however, have presented much difficulty had it not been in effect laid down by Harrison, C. J., in *Castor* v. *The Corporation of Uxbridge*, 39 U. C. R., that it is the duty of the municipalities to remove obstructions on the road placed there by others, and that permitting such obstructions as telegraph poles to remain on the road comes within the meaning of that section of the statute which declares that every public road shall be kept in repair by the corporation, and makes them civilly responsible for all damages."

The three questions thus stated by the learned Judge were substantially the same which had been submitted to the jury, and which the jury had determined in the plaintiff's favour, as shewn by their verdict.

It is not now necessary to discuss how far that finding is supported by the evidence, nor is it necessary to question its correctness, apart from the legal proposition involved in the first question; although one does not readily see how two of the facts found can both have been found correctly, viz., that the pile of wood was an object calculated to frighten horses; and yet that the plaintiff, who knew all about it and whose horse had already shied at it, was not negligent in attempting to pass it at a canter.

In our opinion the first question, which, as the learned Judge reports, was allowed to pass almost without contest, must, as a matter of law, be solved in favour of the defendants.

The circumstances under which the question arises are not the same as those before the Court of Queen's Bench in *Castor* v. *The Corporation of Uxbridge*, 39 U. C. R. 125. In that case the roadway was encumbered by telegraph poles, one of which upset the vehicle in which the plaintiff was riding. In the case before us there was no obstruction opposed to the use of the highway by the plaintiff. It is not charged that the road was in bad order, and although

the firewood may have encroached from two to four feet upon that part of the highway on which it was possible to ride, the plaintiff's horse did not come in contact with it, and would have passed it without difficulty or inconvenience if he had not been startled by its appearance. To hold the corporation liable for such an accident as this would be to charge them with a duty of a different nature from that imported by the words "keep in repair." This expression has been construed by the decisions of our Courts, in conformity with the construction given to similar enactments in several of the States of the neighbouring Union, to require the highway to be maintained in a condition reasonably sufficient for the locality, having regard to the ordinary amount of travel, the circumstances of the municipality, and other matters naturally entering into such an inquiry. The case of *Castor* v. *The Corporation of Uxbridge*, 39 U. C. R. 125, established no new principle. It merely applied the well established doctrine in a case where the safety of travellers on the highway was endangered by obstacles placed upon the road by a stranger, just as it might have been endangered by an excavation made in the highway by a stranger, the effect in either case being to put the road out of repair. This doctrine attaches to the word "repair," as applied to the roadway, a signification sufficiently flexible to meet the widely varying conditions of different localities; and to enable the council of a new township as perfectly to discharge the duty cast upon it, by so far clearing a concession line as to enable a careful driver to pass along it with his team, although many stumps and stones may remain within its limits, or by constructing a narrow corduroy causeway through a swamp, as the same duty is discharged by the council of a city in paving a street from side to side.

The statutory mandate; so expounded, is intelligible, and in practice is easily applied to the circumstances of individual cases. But this important quality of flexibility, on which so much of the practical character, and therefore of the usefulness, of the rule depends, is endangered by an

attempt such as that made in the present case to extend it, and, under the obligation to repair the road, to include the duty of keeping it free from objects which, while they do not block the way of travellers, or even if they obstruct part of the statutory highway are yet permissible in the locality, may nevertheless be calculated to frighten horses. If the rule is to be so extended, how is it to be applied? Is the same standard to be enforced in all localities; or, if not, upon what principle is it to be varied? Is it to be stricter in the more frequented or in the newer districts? It might well be urged that the stricter rule should be applied to the newer neighbourhood; because, as there it is not expected that the road shall be clear of all physical obstructions, there is more reason for having your horse always under control, and more danger from his shying or running away.

It must be further noticed that the contention of the plaintiff in this case takes an opposite direction from that advanced in the other cases in which the force of these words, "keep in repair," has been discussed. Literally, those words are extensive enough to require every municipal corporation to construct and maintain good roads. Their direct force would prescribe the same standard of duty for every place, without regard to the ability or the necessities of its inhabitants. The course of decision has hitherto been in the direction of limiting or qualifying this original force of the terms used, cutting it down in its application to places where a perfect state of repair was neither practicable nor necessary. The present struggle is to enlarge the import of the words beyond their natural and obvious meaning, by reading them as requiring something more than the repairs of the road. In our opinion this contention cannot be maintained.

In considering a matter of this kind, we naturally look for assistance to the decisions of the Courts of those States of the American Union whose circumstances are like our own, and whose legislation on the subject of highways resembles, both in form and in principle, that which is in

force with us. I have examined a number of the decisions of Courts in the United States upon enactments more or less closely resembling those of our Municipal Institutions Act (R. S. O. ch. 174, sec. 491). Our statute makes it the duty of the corporation to keep in repair the public roads, and declares that the corporation shall be civilly responsible for all damages sustained by any person by reason of default in so keeping in repair. The statutes of several of the States are quoted in a note to sec. 786 of Mr. *Dillon's* work on Municipal Corporations, and the reading of these extracts, as well as the perusal of the judgments in which they have been construed by the Courts, suggests the necessity of caution in adopting the decisions as safe guides in expounding our own law; because, although the general duty of corporations with respect to highways is imposed in most of the New England States, and I think in New York also, in terms not essentially different from those used in our statute, there are occasional varieties, amplifications or qualifications in the language employed, particularly in the clauses which prescribe the remedy in case of injury, or define the liability of the corporation, in which may be found the governing principle of the decision.

On the subject more immediately before us, namely, the effect of permitting the existence, within the limits of the highway, of some object, placed there by a stranger, and calculated to frighten horses, although not otherwise obstructing the travelled road or impeding traffic, I find the Courts of different States apparently holding different views.

In Vermont and New Hampshire it appears to be held that the corporations are liable for injuries occasioned by such causes. The statute in each of those States gives damages for injury arising from *insufficiency or want of repair* of any highway, where our statute imposes the liability only for default in *keeping in repair.*

The word *insufficiency* is apparently intended to express a condition of things not covered by the term *want of repair*, and may perhaps have been influential in leading

to the construction adopted, as including other dangers than those incident to a defective condition of the way itself: *Morse* v. *Richmond*, 41 Vt. 435; *Winship* v. *Enfield*, 42 N. H. 197; *Chamberlain* v. *Enfield*, 43 N. H. 356; *Darling* v. *Westmoreland*, 13 Am. 55.

In Massachusetts the statute provides that if any person shall receive any injury in his person or property by reason of any *defect or want of repair* in any highway, he may recover compensation therefor. This enactment very closely resembles our own, and the construction given to it by the Supreme Judicial Court of the State is that which is, in our opinion, appropriate to ours. Amongst the cases in which that Court has so construed the statute, there are two to which I shall particularly refer. *Keith* v. *The Inhabitants of Easton*, 2 Allen 552, was an action for damages occasioned by a horse taking fright at a daguerrean saloon, which stood upon the highway and within about six feet of the travelled part. In the judgment delivered in that case it is pointed out that the distinction between what are, and what are not, the proper attributes of a way is of very great practical importance, as the officers charged with the care of highways are bound to remove, without delay, all defects in the highways. After referring to observations made in the case of *Hixon* v. *Lowell*, 13 Gray 59, the learned Judge who was delivering the judgment said: "The discussion of the present case suggested many other illustrations. Cattle or horses running at large might frighten the traveller's horse; the sight of flags displayed, or a window curtain fluttering in the wind over the street through a raised window; the goods displayed in front of shops; the numberless operations of business or amusement constantly carried on in our cities and villages within the limits of the highway; the gatherings at agricultural fairs, military trainings and other public occasions, may, any or all of them, tend to frighten many passing horses; yet it would be a novel doctrine to hold that the highway surveyors may interfere in such cases under their authority to repair highways, or that the attributes of a way include

them because they may frighten horses. And we think that the daguerreotype saloon described in the report though it may have been a nuisance for which the proprietor might be liable to an action or indictment, yet since it did not obstruct the travelled path in any other way than by the fact that it was in sight of the plaintiff's horse, did not constitute a defect, as to any of the proper attributes of a way."

The other case to which I refer is *Kingsbury* v. *The Inhabitants of Dedham*, 13 Allen 186. The complaint there was that plaintiff's horse had been frightened by a pile of gravel which workmen, employed in spreading gravel on the road, had left in the centre of the travelled way. I make an extract from the instructive judgment delivered by Chief Justice Bigelow, which is apposite to our present inquiry. He said: "Upon careful consideration, it seems to us that it would be giving an unwarrantable interpretation to the statutes which impose on towns the duty of keeping the highways within their respective limits in safe and convenient condition, and render them responsible for injuries arising from defects or want of reasonable repairs, to hold that the existence of an object within the limits of a way, or the state of the surface of the road, which may cause horses to take fright, constitutes a culpable neglect. It would be quite impracticable for a city or town, however diligent and careful it might be, to conform to such a standard of duty. A small piece of white paper lying on the surface of a way in a bright sunlight; a discolouration of a patch of the road, by moisture or other cause, rendering it darker than other portions; a little tuft of hay or seaweed lying by the side of the travelled path; these and other similar objects which the highest diligence could not prevent or seasonably remove, would expose towns to liability to actions for damages. In the case at bar there is nothing in the facts stated in the exceptions from which it can be fairly inferred that the road at the place where the accident happened was defective, except that it was in such a condition as to cause the plaintiff's horse to take

fright. On the contrary, the alleged defect was a small pile of loose gravel, not exceeding fifteen inches in height, over or through which the wheels of the carriage, if they had come in contact with it, would in all probability have passed in safety. Under the instructions given to the jury, it is to be presumed that the verdict for the plaintiff was founded solely on the fact that the heap of gravel was of such a shape and character as to be likely to frighten horses. This construction was erroneous. A town is not liable for every object which renders a way unsafe or inconvenient for travellers to pass over it; but only for such as not only render the way unsafe and inconvenient, but also defective or out of repair; and the injury must be attributable to the defect or want of repair."

The language used in these judgments, as well as the decisions themselves, are entirely pertinent to the case before us, and in accord with what we conceive to be the proper construction of our statute.

The appeal must be allowed, with costs; and the rule in the Court below made absolute to enter a nonsuit,

Appeal allowed.

SMITH V. DOYLE.

Bill filed on behalf of plaintiff and all other creditors—Effect of.

To a bill filed by the assignee in insolvency of P. D., for the creditors other than D. & J. S., to impeach a sale of real estate to the defendant, the answer set up that before the proceedings in insolvency a bill was filed by D. & J. S. as execution creditors, on behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance in question as a fraud upon creditors, and that the bill was dismissed upon the merits. It was further alleged, that the case made by the two bills was substantially the same, and that the defendant believed that the evidence in this suit would be similar in effect to that upon which the decree refusing relief was founded.

Held, reversing the judgment of the Court of Chancery, that the decree was not a bar to this suit.

Held, also, that the bill set out below sufficiently averred the delivery of the alleged deed, and that the defect, if any, was removed by the answer.

THIS was an appeal from an order of the Court of Chancery upon rehearing, by which a decree for the dismissal of the bill was affirmed.

The suit was brought by the assignee in insolvency of Patrick Doyle, for the creditors other than D. & J. Sadlier, to impeach a conveyance of real estate to the defendant. The answer set up that before the proceedings in insolvency a bill was filed by Dennis Sadlier and James Sadlier as execution creditors, on behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the conveyance in question as a fraud upon creditors, and that after answer the bill was dismissed upon the merits. It was alleged that the facts set forth in the two bills were substantially the same: that the case made by each was the same; and that the defendant believed that the evidence, if this suit proceeded, would be similar in effect to that upon which the decree refusing relief was founded. Upon that state of facts the decree was put forward as a bar to this suit.

The appeal was argued on the 22nd November, 1879 (*a*).

J. A. Donovan, for the appellant. The decree dismissing the bill filed by D. & J. Sadlier on behalf of themselves

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and all other creditors cannot be held to estop the plaintiff in this suit, who as assignee represents all the creditors, from impeaching the same transaction. It is clear that no person who is not a party to a suit, or who has not a common interest in the subject matter thereof, can have his rights determined therein. The Sadliers having proved their claim before the plaintiff, have the same right as any other creditor of Patrick Doyle; and, under section 68 of the Insolvent Act of 1875, are entitled to pursue any remedy they have in the plaintiff's name. But the Court has no cognizance of any party but the plaintiff in this suit, and his right to impeach the transaction admits of no question. We should have been allowed to read the answer of the defendant at the hearing, which would have shewn a complete transfer from Patrick Doyle to the defendant. There being no demurrer on the record a demurrer *ore tenus* ought not to have been permitted. He cited *Spencer* v. *Williams*, 2 P. W. 230; *Huggins* v. *York Building Co.*, 2 Atk. 44; *Bigelow* on Estoppel, 2nd ed., 115, 116, 118, 134, 159, 46, 47, 65, 69, 70, 75, 80; *Bruff* v. *Cobbold*, L. R. 7 Ch. 217; *Wilson* v. *Church*, L. R. 9 Ch. Div. 552; *Ex parte Cooper Re Zucco*, L. R. 10 Ch. 510; *Jones* v. *Nixon*, 1 Yonge 359; *Collins* v. *Cane*, 27 L. J. Ex. 146; *In re Campbell*, 25 Gr. 480; *Barre* v. *Jackson*, 1 Phil. 572; *Mitford* on Pleading, 249-409; *Story* on Pleading, 7th ed., sec. 464; *Brandlyn* v. *Ord*, 1 Atk. 571.

J. O'Donohoe and *Haverson* for the respondent. This suit is in every respect the same as that of *Sadlier* v. *Doyle*, which has been determined in favour of the defendant, and as the proceedings therein have in no way been impeached, this bill should be dismissed. The fourth paragraph shews that the bill was demurrable *ore tenus*, as it sets out that the deed was not delivered. It is further alleged in the bill that the lands are vested in the plaintiff; and if this be so no bill should have been filed, as the remedy should be in ejectment for the possession of the lands. Virtually the bill is for the delivery of the said deed to be cancelled, and this cannot be granted inasmuch

as it is not alleged to be in the defendant's possession. They referred to *Bigelow* on Estoppel, 2nd ed., 47; *Greenleaf* on Evidence, 12th ed., sec. 535; *Story* on Pleading, secs. 73, 737; 780, 790; *Mitford* on Pleading, 164, 166, 237, 246, 248; *Poore* v. *Clark*, 2 Atk. 515; *Barker* v. *Walters*, 8 Beav. 92; *Lentilhon* v. *Moffat*, 1 Edw. Chy. 457; *Brinkerhoff* v. *Brown*, 6 John Chy. Rep. 139; *Commissioners, &c., of London* v. *Gellatly*, 24 W. R. 1059; *Womersley* v. *Merritt*, L. R. 4 Eq. 695; *King* v. *Tullock*, 2 Sim. 469; *Folland* v. *Lamotte*, 10 Sim. 486.

December 1, 1879. MOSS, C. J. A.—Upon the trial it was objected at the threshold of the case that the matter was *res judicata*, and without the plaintiff being permitted to adduce any evidence in support of his case upon the merits, it was determined that the decision against the Sadliers operated as a bar to the plaintiff. This objection did not appear upon the bill, and could only be raised for discussion by reference to the answer. Upon the rehearing it was further objected for the first time that the bill was demurrable, because it contained the allegation that Patrick Doyle "consented and agreed with the defendant, who is his brother, to convey and assure to him the said land for a nominal consideration of five hundred pounds, to be expressed in the deed of conveyance, and the said Patrick Doyle caused a deed of conveyance to be prepared accordingly by his own solicitor, and the same was dated on the said 27th day of August, and was executed by the said Patrick Doyle and the defendant on the day of the date thereof, but the said deed was never delivered to the defendant, nor was the same ever registered, but remained with the solicitor of the said Patrick Doyle, and was by him afterward handed to the said Patrick Doyle, in whose custody it has ever since remained." It is stated in the case that the plaintiff's counsel proposed to read the defendant's answer in order to shew that the whole record disclosed a complete transfer of the land, but the Court refused to allow this or an amendment of the bill, and sus-

tained the demurrer, the result of which was to affirm the original decision. We apprehend that there must be some misconception of the course taken by the Court. The answer expressly stated that "there was no understanding whatever that the said deed should, after execution, remain undelivered or unregistered; on the contrary, it was well understood, at the time it was signed by the said Patrick Doyle, that nothing remained to be done but the registration of the same, and it was left with the said solicitor for that purpose and the fees paid to him." The assertion of a complete delivery is further emphasized and amplified in a manner that leaves nothing to be added.

It seems very improbable that the Court refused, as the case alleges, to permit the plaintiff to exercise the ordinary right of using any statement in the answer which he conceived to be for his benefit—the more especially when the defendant was obliged to refer to the answer in order to raise the other objection upon which he relied. The Court would not, upon a trial, when the witnesses were present and the expense incident to a thorough investigation of the merits had been incurred, shut its eyes to the answer, and if not, it would refuse to countenance such an objection to the bill when started at the hearing. But even if this objection were completely open to the defendant, we are of opinion that it was without substance. The true effect of the plaintiff's statement is, that the deed was executed so as to be an effectual conveyance of the land *inter partes*, but that the piece of paper was retained in the possession of the insolvent. There is, therefore, a sufficient averment that the estate passed, while the gist of the objection is, that it remained in the insolvent, and accordingly no suit was necessary.

The defendant must, therefore, fall back upon his plea of *res judicata*. We are of opinion that this is not maintainable. The Sadliers did not represent the rights with which the assignee is now invested. Although their bill, to use the phraseology of the answer in this suit, *purport* to be on behalf of themselves and the other creditors who

should contribute to the expenses of the suit, they did not and could not represent all the creditors of Patrick Doyle. No creditor but those who had put their claims into judgment could obtain any benefit from their success. There was no way in which creditors who had not proceeded to execution could come in even if a decree had been obtained. No other creditors were affected, except those who might have, after decree, elected to prove in the Master's office upon their executions, and who would then be prevented from proceeding with an independent suit. But even an execution creditor had no avenue for obtaining access to the suit until after a decree setting aside the conveyance, while there was no place at any time for creditors who had not taken proceedings at law. The plaintiffs might have compounded with the defendant, or dropped their suit without the slightest reference to other creditors. It does not seem to require any elaborate argument to shew that a decree in a suit bearing this character lacks the essentials of a judgment recovered.

The only English case that I have succeeded in finding, which presents even a semblance of supporting the contention is, *Barker* v. *Walters*, 8 Beav. 92. The question before Lord Langdale was, whether a bill was sustainable which had been filed by three directors of a company or association on behalf of themselves and all other members, with the usual averment that the number was so large that it was impossible with reasonable convenience to join them as parties. In dealing with this his Lordship considered the objection that, if such a suit were permitted, other shareholders might bring similar suits, and the defendant might be harrassed and oppressed. In answer to this the learned Judge said in substance, that it was his impression that if an unincorporated company gave its directors certain powers, and they incurred certain obligations towards others, and brought a suit for the benefit of themselves and all the members, the Court would prevent any other members from bringing a similar suit. But the want of similarity between that case and the present is

quite obvious. Nor is the case of *Commissioners, &c., of London* v. *Gillatly*, 24 W. R. 1059, at all analogous. It only decides that when a decree is made upon a bill establishing a right, it is binding upon a person, not a party to the suit, who belongs to the class which the defendant represented, unless he can shew some good reason why he should not be bound. The principle is, that it is of the very essence of such a suit that the defendants should, in the opinion of the Court, adequately represent the class, and that, until satisfied upon this point, the Court will not proceed to an adjudication ; but that, when satisfied, the Court will determine the right without requiring every individual in the same interest to be brought before it In short the very object of such a bill is to prevent the multiplicity of suits. I have examined the other cases cited, and they do not in my opinion assist the defendant.

The appeal must be allowed, with costs ; and the case sent back for a hearing, and the defendant must pay the costs of the rehearing, and return any costs he may have been paid, but we do not give any costs of the abortive trial.

BURTON, J. A.—There must be some inaccuracy in the statement of the case in representing that the question disposed of at the hearing was raised by demurrer *ore tenus.* The existence of the former proceedings in *Sadlier* v. *Doyle*, which it is now said preclude the present plaintiff from impeaching the transaction sought to be set aside in the former suit, does not appear upon the bill, and the question, therefore, could not have arisen on demurrer. But as that point was actually taken by the answer the learned Judge properly required it to be discussed before entering into the case upon the evidence, and having come to the conclusion that the plaintiff was estopped by the former adjudication, it became useless to proceed, and the bill was accordingly dismissed. The first question is, therefore, whether a decree dismissing the plaintiff's bill in a suit instituted by one of several creditors on behalf of himself and such other credi-

tors as should come in and contribute to the expenses of the suit, is such an adjudication as will be binding upon the rest of the creditors and upon the present plaintiff, who, under the provisions of the Insolvent Act, is suing, not, it is true, for the creditors generally, but for creditors other than Sadlier.

There was no written judgment by the learned Chancellor, and the cases cited to us on the argument do not appear to bear a very close analogy to the case we are considering, being principally cases like those of commoners, in which a general claim or privilege is sought to be established or taken away, in which cases the Court takes care that sufficient persons affected are before it fairly and fully to ascertain and try the general right in contest, and the decree so obtained is ordinarily binding upon all persons standing in the same predicament.

No authority was cited for the position that a creditor, who could file a bill on his own behalf to set aside a fraudulent conveyance, could, by suing on behalf of other creditors, preclude them from taking similar proceedings on their own behalf.

It continues until decree to be the suit of the actual plaintiff alone. He has a right either to dismiss or compromise it; but when a decree is made the case is different. He ceases then to have the absolute control, and the general body of creditors for whose benefit the decree is made become entitled to intervene.

There is nothing to prevent several creditors separately filing bills for the same purpose; and it surely never could be contended that because a creditor who has chosen to file a bill on behalf of himself and other creditors fails in his suit, that the other suits can be affected. It appears to me that the only result of the dismissal of the bill in Sadlier and Doyle was, that it could be pleaded in bar to a second suit between the same parties, as it could also have been between this plaintiff and the former defendant, if it had appeared that he was suing under the provisions of the Act for the Sadliers alone.

But upon rehearing the further objection was taken, as it is said, by demurrer *ore tenus*, that it contained no allegation of the delivery of the deed from Patrick Doyle to the defendant. This statement must also, I think, be erroneous. As I understand the practice a demurrer *ore tenus* is never allowed, unless there is a demurrer on the record.

Under the orders, it is true, that where a bill has been taken *pro confesso*, the defendant can, after waiving any objection to the order *pro confesso*, argue the case upon the merits as stated in the bill, and if it clearly appears that it discloses no equity entitling the plaintiff to the assistance of the Court, the bill may, notwithstanding the order, be dismissed.

And so I apprehend, it must be open to the defendant, whatever issues there may be on the record, to show, that upon the facts stated in the bill the plaintiff is not entitled to any relief; but that is a very different thing from selecting a particular allegation as defective, which is or ought to be cured by pleading over, and *a fortiori* where the defect itself is removed by admissions in the answer. I think that even upon demurrer we are bound to put a fair and reasonable construction upon the pleading so as to ascertain from the whole what is reasonably to be inferred. Is it not rather a forced construction, when we find it averred that the insolvent concerted and agreed with the defendant to convey the land, and that he caused a deed accordingly to be prepared and executed, to hold that execution did not include delivery, without which there would be no execution, because it goes on to aver that it was never delivered to the defendant, but remained with the solicitor who prepared it. I should have very little hesitation in holding in a common law pleading that the averment meant that the deed was signed, sealed, and delivered, and after delivery handed to the solicitor, and I can hardly imagine that more certainty can be required in equity than at law.

I think, however, that at the hearing the whole record should have been looked at, and upon referring to the answer we find the defendant expressly asserting that it was delivered.

I can well understand from what we have seen of this case that it may be a very difficult thing successfully to impeach this transaction after the lapse of so long a period; but this plaintiff, or those in whose interest he is called upon to act, are entitled to have the matter investigated if so advised: that is a matter on which they must be allowed to exercise their discretion, and as I think both grounds upon which the bill was dismissed untenable, they ought to have been allowed to proceed to a hearing upon the merits.

The appeal, therefore, should be allowed.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal allowed.

MILLER V. REID.

Insolvency—Money paid within thirty days—Action to recover same.

A. sold his stock-in-trade and assets of all kinds to S., the sale being arranged and carried out by one R., to whom the cash portion of the purchase money was paid. R. afterwards, and within thirty days of A.'s being declared insolvent, accepted and paid out of this purchase money two drafts drawn on him by the defendant, being the price of goods for which A. was indebted to the defendant. The plaintiff, as assignee in insolvency of A., sued the defendant to recover back the money so paid him. The defendant set up that the drafts were drawn on, and the money paid, by R. under a personal undertaking contained in letters written to him by R.

Held, affirming the judgment of the Common Pleas, 29 C. P. 576, that the plaintiff was entitled to recover: that the evidence shewed that defendant had probable cause for believing A. to be insolvent when he received the money, which clearly belonged to A.; and that R. made such payment out of A.'s money and as his agent.

Held, also, that the acceptance was not a valuable security within sec. 134 of the Insolvent Act of 1875, which the assignee was obliged to restore to the defendant as a condition precedent to the prosecution of the suit.

THIS was an appeal from the judgment of the Court of Common Pleas discharging a rule *nisi* to enter a verdict

for the defendant, reported 29 C. P. 576. The facts are fully stated there, and in the judgment on this appeal.

The appeal was argued on the 4th September, 1879 (*a*).

Mackelcan, Q. C., for the appellants. The evidence shews that the money sought to be recovered in this action never was the insolvent's property, and therefore it never passed to the assignee: *McGregor* v. *Hume*, 28 U. C. R. 380; *McWhirter* v. *Thorne*, 19 C. P. 302; *Marks* v. *Feldman*, L. R. 4 Q. B. 431. Before the plaintiff can recover he must shew that all the elements mentioned in the 134th section of the Insolvent Act of 1875 existed; but it clearly appears that the payment was not made by the insolvent, but by Rykert in discharge of liabilities he had himself incurred to the defendant. Nor was it proved that the debtor was unable to meet his engagements in full, or that the defendant knew of such inability or had probable cause for believing it to exist: *Smith* v. *Hutchison*, 2 App. R. 405, 409. It is submitted that the securities which the defendant gave up on the payment being made to him should have been restored before the commencement of this action. It was not necessary to raise this defence by special plea. No objection was made at the trial to this defence on the pleadings as they then stood, and when objection was taken in term, leave was asked to add a plea if the Court thought necessary. As the defence goes to the merits, it should be allowed now, if necessary. He referred to *Barron* v. *Husband*, 4 B. & A. 611; *Williams* v. *Everett*, 4 East 582; *Marks* v. *Feldman*, L. R. 4 Q. B. 481, L. R. 5 Q. B. 275.

Walker for the respondent. It is established beyond all reasonable controversy that the money in dispute was the insolvent's property when it was paid to retire the appellant's drafts, and the learned Judge so found at the trial. His lordship also found that the defendant had probable cause for believing Aikine to be insolvent when the payment

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in question was made, and that the defendant paid the drafts within thirty days before the issue of the writ of attachment, so that we proved everything necessary to enable us to succeed under the 134th section. The defendant should have raised the defence founded on the surrender of the securities by a special plea. The Court in term refused to add such a plea, and being a matter of discretion in the Court below such a matter is not appealable. But the notes and acceptances were not valuable securities within the meaning of the section. He cited *Frend* v. *Dennett*, 4 C. B. N. S. 576; *Cathcart* v. *Hardy*, 2 M. & S. 534; *Steel* v. *Smith*, 1 B. & Al. 94; *Thibault* v. *Gibson*, 12 M. & W. 88; *Petty* v. *Cooke*, L. R. 6 Q. B. 790; *Pritchard* v. *Hitchcock*, 6 M. & G. 157; *Churcher* v. *Cousins*, 28 U. C. R. 540; *Churcher* v. *Johnston*, 34 U. C. R. 538; *Lief* v. *Tuton*, 10 M. & W. 393; *Charter* v. *Greame*, 13 Q. B. 216.

December 1st, 1879. BURTON, J.A.—There can be no doubt that the defendant had reasonable cause for believing that Aikine was insolvent when the payments which are sought to be recovered back in this action were made, and having been made within thirty days next before the issue of the writ of attachment, that they are void, if they were made under such circumstances as to constitute them *payments by the insolvent*. If they were not payments by the insolvent, the statute does not apply to them and they can not be disturbed, in such case any discussion as to the effects of the proviso to the 134th section would become unnecessary, whereas if the payments were made by Rykert, as the agent, and by the authority and direction of the insolvent, from funds of the insolvent in his hands, neither the insolvent's notes nor the acceptances of Rykert answer the description of a valuable security within the meaning of the proviso. It never could be contended that when an insolvent has, in fraud of this section of the Insolvent Act, paid his own note, and obtained possession of

it, that his assignee could not bring an action to recover the money back without restoring the note.

The words "valuable security," would probably not be confined to such securities as are referred to in the 84th section, which the creditor would be required to value before proving his claim, but would embrace any collaterals which the creditors held for payment of the claims.

It would be manifestly unjust, that a creditor holding a valid security—either direct from the insolvent, as a mortgage on a portion of his real or personal estate, which he would be required to value, or by the bond, or guarantee of third parties given independently, and which he would not be bound to value—should be deprived of that security in the event of the payment in consideration of which it may have been delivered up to the insolvent being declared void under this section; and if the evidence had established simply the fact that the creditor here had succeeded in procuring Rykert's acceptance as additional or collateral security for the payment of his claim, and had on payment by the insolvent delivered such acceptance to him, I do not doubt that he must have been placed in *statu quo* before the assignee could compel the repayment; but I do not regard Mr. Rykert's acceptance under the circumstances as a security within the meaning of the statute. The evidence establishes, and the learned Judge has found, that he came under acceptance at the instance and by the authority of the insolvent, the creditors well knowing, and all parties then intending, that it should be paid from funds of the insolvent in Rykert's hands, funds derived from the sale of the stock of the insolvent, and to the possession and control of which he was then absolutely entitled.

I have already stated that all the other ingredients necessary to make this payment void within the 134th section existed, and have been found by the learned Judge of first instance, confirmed in that respect by the learned Judges who were called upon to consider the case in *banc*. What, then, is the evidence in reference to this having been in fact a payment by the insolvent, as

found by the learned Judge as a question of fact at the trial?

The sale of Aikine's stock in trade, and assets of all kinds connected with it, was made on the 24th of January, 1878, and the sum of $3,000 was paid previously to that time into the hands of Rykert for the purpose of paying the cash portion of the purchase money. Aikine became beneficially entitled to the money so deposited with Rykert at that date. The defendant called upon Rykert about the 26th of January, and found fault with Aikine for selling out, urged him strongly to pay him, and intimated that unless he got the money from Rykert, he would not get it at all. Rykert then declined to pay, and would not do so until after he had an interview with Aikine: he afterwards got authority from Aikine, and in consequence of that gave the acceptances which he afterwards paid.

Rykert's own evidence upon this point is: "These drafts were paid out of moneys in my hands belonging to Aikine, part of the purchase money of the stock."

If Rykert had, under the authority of Aikine, paid this money then and there in cash to the defendant, there would have been no doubt of the right of the assignee to recover. Can it make any difference that Rykert then or shortly afterwards, in pursuance of that arrangement and agreement, came under obligation to make the payment which he subsequently made out of Aikine's funds? It is unnecessary to consider what might have been the position of the several parties to this transaction had insolvency actually intervened between the date of the acceptance and the payment. Here the payment was made from Aikine's funds in pursuance of the order or authority given by Aikine to Rykert, the defendant being well aware that these were the insolvent's moneys, and that there was no other motive or consideration for Rykert assuming the payment of his debt.

If the provisions of the Insolvent law can be evaded by a third party intervening and coming under engagement to

pay, instead of actually paying a creditor whom the insolvent desires to prefer, this section will be soon found to be a dead letter.

For my part, I fully concur with the finding of the learned Judge at *Nisi Prius*, and am of opinion that Rykert was acting in the transaction as the agent of the insolvent, and paid the defendant's debt from the insolvent's funds, and that there is no room therefore for the argument adduced before us, that it was incumbent upon the plaintiff to restore the notes and acceptances before instituting proceedings.

I am clearly of opinion that the appeal should be dismissed, with costs, and the rule to set aside the verdict discharged.

Moss, C. J.A.—I am of the same opinion, and I have but little to add to the observations of my brother Burton. I entirely agree with the conclusion which the learned Judge who tried the case formed, that the money paid by Rykert to the defendant was the money of the insolvent. It was insisted that it had not become the insolvent's property, because it had been received from the purchase of the insolvent's business, and Rykert had undertaken to apply it in the discharge of certain liabilities. But to give effect to this obligation would be to exaggerate out of due proportion the form of the transaction and to shut one's eyes to its substance. Rykert's evidence upon the point is pointed and unambiguous. He shews that whatever his undertaking had originally been, he considered himself the holder of the money, subject to Aikine's directions. At any rate he consented to obey Aikine's mandate in favor of the defendant. I feel equally clear that the learned Judge is correct in holding that Aikine was then unable to meet his engagements, and that the defendant had probable cause for believing that to be the case. The soundness of that view will scarcely be questioned by any one who impartially examines the evidence. Indeed, I should, for my own part be prepared to draw the infer-

ence that the defendant must have actually known of the inability. Then the payment having been made within the thirty days, the amount is recoverable from the defendant for the benefit of the estate, unless the proviso to the 134th section is available for his protection. This enacts that if any valuable security be given up in consideration of the payment, such security or the value thereof shall be restored to the creditors before the return of such payment can be demanded. My reason for thinking this proviso inapplicable is the simple one, that Rykert only accepted the bills, which it is now claimed the assignee should first return, upon the understanding that he should meet them out of the moneys of Aikine in his hands. It was never the intention of either party that Rykert should come under any personal liability. In this view the acceptance was clearly not a valuable security, which the assignee was obliged to restore to the creditor as a condition precedent to the prosecution of a suit.

PATTERSON and MORRISON, JJ. A., concurred.

Appeal dismissed.

IN RE MCCRAKEN—DALLAS V. STINSON.

Insolvent Act of 1875.—Claim for rent.

Upon the insolvency of the lessee. the assignee in insolvency sold the insolvent estate, including the goods upon the demised premises, on credit, without paying the rent due thereon.

Held, that the landlord was entitled to an order for immediate payment of the arrears.

Remarks as to the personal liability of the assignee under such an order.

Per Moss, C.J.A.—If before the assignment or attachment in insolvency the landlord has levied, the assignee cannot take the goods out of his possession without payment or tender of the six months' arrears of rent.

After the assignee has taken possession the landlord cannot seize, but he is entitled to be paid the six months arrears out of the proceeds of the goods on the demised premises in preference to any other claim.

The landlord is not a privileged creditor, but is only entitled to a lien upon the proceeds of the goods of the insolvent which he might have distrained.

If the assignee sells the goods upon credit he must arrange with the landlord before the goods are removed, otherwise he becomes liable to an order for immediate payment.

If the creditors or inspectors order him to make such a sale, and do not provide him with the means of satisfying the landlord, he should apply to the Judge for directions.

Whenever the assignee remains in possession unreasonably long without realizing and paying the landlord, the latter may invoke the summary jurisdiction of the Court.

THIS was an appeal from an order of the Judge of the County Court of Wentworth sitting in insolvency.

From the admissions contained in the case, which was stated for the opinion of the Court, it appeared that when the insolvency occurred McCraken, the insolvent, was in arrears for rent of certain premises to the extent of $120 upon the quarter ending 1st December, 1878, and $250 upon the quarter ending 1st March, 1879. On the 10th of March the assignee wrote to the lessor informing her that he had received instructions from the inspectors to give up possession of the premises on the 19th of March, and that he would pay the rent up to that day. At this date there were goods upon the premises liable to distress of more than sufficient value to satisfy the rent. On the 17th of March the assignee, by the direction of the inspectors, sold all the goods of the insolvent estate, upon credit,

and received four promissory notes of $905.78 each from the purchasers, whose solvency was beyond dispute. The first of these matured on the 20th June. The goods were removed from the premises on the 17th or 18th of March, without the knowledge or consent of the lessor, who had not levied any distress. Having demanded payment of her rent, the assignee, on the 26th of March, informed her by letter that he had not sufficient funds in hand to pay the claim, but that he would do so out of the first moneys received, and he added the assurance that she should be the first paid. Nevertheless, she obtained a summons on the 4th of April, in pursuance of which the following order was made on the 8th of July.

"Upon reading the summons granted by me in the cause, and the affidavit of service thereof, and upon hearing what was alleged by counsel for the assignee of the above insolvent estate and Sadie Catharine Stinson, the landlord, I do order that the said assignee, Andrew Chisholm Dallas, do forthwith pay to the said Sadie Catharine Stinson, or to her attorneys, Messieurs Kilvert & Duggan, the sum of four hundred and twenty-five dollars and fifty-four cents, the amount of rent due herein, together with the costs of this application to be taxed, and the said assignee is to be at liberty to retain out of said estate the costs of the proceedings herein."

This order was not made until nearly three weeks after the first of the purchaser's notes had become due, and it was not suggested that it was not retired at maturity.

The assignee appealed.

The appeal was argued on the 11th November, 1879 (*a*).

R. Martin, Q.C., for the appellant. The learned Judge had no jurisdiction to make the order in question herein: *Ex parte Dicken*, L. R. 8 Ch. D. 377; *Ex parte Musgrave*, L. R. 10 Ch. D. 94; *Whyte* v. *Treadwell*, 17 C. P. 491; Insolvent Act of 1875, secs. 71, 72, 73 and 74, as amended by 40 Vic. ch. 41, secs. 16, 17, 18, 19; Insolvent Act of 1875, secs. 80, 82, 88, 93, 104, 138; *Burke* v. *McWhirter*, 35

(*a*) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

U. C. R. 1; *Henderson* v. *Kerr*, 22 Gr. 91; *Wells* v. *Hews*, 24 Gr. 131; *Re Kennedy*, 36 U. C. R. 471. The respondent did not, while the goods in dispute were upon the demised premises, either before or after the assignment by the insolvent, distrain upon the goods in respect of any of the rent due to her, and she therefore never acquired or had any lien upon such goods when the insolvent assigned, nor when the goods were sold by the appellant as such assignee, nor when the goods were removed from the demised premises: *Re Fair* and *Bell*, 2 App. R. 632, 636; *McLeod* v. *McQuirk*, 2 S. C. Rep. N. B. 252; *Griffith* v. *Brown*, 21 C. P. 12, 17; *Re Heyden*, 29 U. C. R. 262, 263; *McEdwards* v. *McLean*, 43 U. C. R. 454, 458, 459; *Ex parte Birmingham Gas Co.*, L. R. 11 Eq. 615; *Ex parte Hill*, L. R. 6 Ch. D. 63, 66; *In re Stockton Iron Furnace Co.*, L. R. 10 Ch. D. 335, 358; *Blackburn* v. *Lawson*, 2 App. R. 215, 225; *Holmes* v. *Tuton*, 5 E. & B. 65, 77; *Freeman* v. *Edwards*, 2 Ex. 732, 740. The respondent's claim for the rent due to her by the insolvent is merely as a creditor of the insolvent, and to be duly ranked upon the dividend sheet, and she should, as requested by the appellant, have made and proved her claim, and sworn to the same before presenting her petition: *Re Fair*, 2 C. L. J. N. S. 216; *Re Heyden*, 29 U. C. R. 262, 265; *Burke* v. *Mc Whirter*, 35 U. C. R. 1, 6; *In re Hoskins*, 1 App. R. 379; *Munro* v. *Commercial Building Society*, 36 U. C. R. 464, 470; *Holmes* v. *Tuton*, 5 E. & B. 65, 77. The appellant should not have been held personally liable to pay to the respondent the rent due, and the order is erroneous in ordering, as it in effect does, the appellant to personally, and with his own private moneys, pay to the respondent her claim: *In re Sneezum*, L. R. 3 Ch. D. 463; *White* v. *Treadwell*, 17 C. P. 488, 491; Insolvent Act of 1875, secs. 35, 36, 38, 138, 88.

N. W. Hoyles for the respondent. The order appealed from is not a personal one against the assignee. It was intended and is merely a direction to the assignee, to pay the respondent the amount of the rent. But even if it were, the cases shew that the learned Judge would have

been justified in making such an order. It is held in *Mason* v. *Hamilton*, 22 C. P. 195, that the Statute, 8 Anne, ch. 14, must be looked at in construing the sections in the Insolvent Act of 1875 affecting the rights of landlords. Here there has been a clandestine removal of goods within the meaning of 8 Anne, ch. 14; and if a sheriff had acted in a similar way he would have been personally liable to the landlord: *Woodfall* on L. & T. 443; and the remedy against him would have been by summary application to the Court out of which the writ under which he was acting issued: *Arnitt* v. *Garnitt*, 3 B. &. A. 440. There is no provision in the Act for a landlord ranking in respect of his lien; it is neither a secured nor a privileged claim. The lien only exists when there are goods actually on the premises at the time of the insolvency: *Mason* v. *Hamilton*, 22 C. P. 195; *In Re Hoskins*, 1 App. R. 382.

December 1, 1879. MOSS. C. J. A.—It was made a question at the bar whether the order complained of directed payment of the petitioner's claim by the assignee personally, or only out of the assets of the estate. It was not, and could not be, disputed that if the assignee made the payment out of his own funds, he would be entitled to be recouped out of the estate. In view of all the circumstances I do not think that the order was intended to be, or can properly be described as, a personal judgment against the assignee. It is true that it does not expressly direct the payment to be made out of the assets of the estate, but I take that to be its real effect. If the Judge had authority to make the order, it is derived from the 125th section of the Act, which does not provide for its enforcement by any process of execution against the assignee's property, but makes imprisonment as for contempt the penalty of disobedience. It cannot be doubted that if the assignee's reason for not paying in obedience to the order was, that assets had not reached his hands, it would be accepted by the Judge as an adequate excuse. I apprehend that less attention was paid to the form of the order, because at the

time it was actually pronounced the assignee had received from the sale of the estate more than enough to satisfy the landlord's claim. As I have not the least idea that either the assignee or the creditors contemplated so unjust a proceeding as that of depriving this lady of her rent, their substantial complaint being, that instead of taking this hostile step she should have waited until moneys had actually been realized from the sale, it would seem that the real controversy only touches the question of costs But to determine this, it is necessary to consider the relative rights of the parties.

It is broadly contended by the assignee, that the lessor, not having levied any distress, never acquired any lien or privilege over the goods upon the demised premises. He thus raises the much discussed question, whether the lessor can distrain after possession has been taken under the assignment. The learned counsel, in the course of a very full and careful examination of the authorities, cited many English decisions bearing upon the question. For example, in an anonymous case reported in 1 Atk. 102, Lord Hardwicke held that the landlord might distrain. either before or after the assignment under the commission, but that if he neglected to do so, and suffered them to be sold by the assignees, he could only come in with the rest of the creditors, and the same point was ruled in *Ex parte Deschannes*, 1 Atk. 103. These cases would manifestly be very apposite if the landlord stood on the same footing under our Insolvent Act and the English Bankruptcy Law. In *Ex parte Plummer*, 1 Atk. 103, it was held that the right to distrain was not extinguished even by a sale of the goods by the assignees, if they had not actually been removed. The authority of these decisions, and their applicability to the Bankruptcy Act of 6 Geo. IV, were recognized in the comparatively recent case of *Briggs* v. *Sowry*, 8 M. & W. 729. At the present day in England the right to distrain has been preserved with certain modifications. For example, in *Re Mayhew*, L. R. 16 Eq. 98, it is laid down that the landlord may exercise his

right after the tenant has filed a petition for liquidation, and the receiver has taken possession. But those rights have been reserved to the landlord by the express language of the various Bankruptcy Acts. Before the Act of 1849 his remedy extended to the whole of the rent due before bankruptcy. By that Act the right to distrain after the act of bankruptcy was confined to one year's rent, and for the surplus the landlord was obliged to make proof. This legislation, however, distinctly recognized the existence of the Common Law power even after the bankruptcy. The Act of 1869 explicitly provides that the landlord may distrain at any time either before or after the commencement of the bankruptcy, with this limitation, that if the distress be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication. These statutory provisions left no room for questioning the continuance of the right after bankruptcy had occurred, and the cases arising under them can afford us little or no assistance.

The solution of the question for the purposes of our jurisprudence depends upon the combined effect of the 74th and 125th sections. Although these sections have been the subject of such frequent comment that their language is very familiar to the bar, it will be convenient to restate it in this connection. The former enacts that the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of one year, which by the Act of 40th Victoria has been reduced to six months, last previous to the execution of a deed of assignment, or the issue of a writ of attachment, and from thence so long as the assignee shall retain the premises leased. The latter enacts that all remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, hypothec, lien, or right of property, upon, in or to any effects or property in the hands, possession, or custody of an assignee, may be obtained by an order of the Judge on summary petition in vacation, or of the Court on a rule in term,

and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever. In dealing with the 74th section the Courts have felt some difficulty in placing a satisfactory construction upon the term "preferential lien." The nature of that difficulty will best be appreciated by considering the language of the late Chief Justice of this Court, in *Mason* v. *Hamilton*, 22 C. P. 413; where he observed: "If the latter word is construed according to our law, it means a right to keep possession of the goods of another until a claim or claims of the holder of the goods against that other are satisfied. It, therefore, implies an actual possession; not a mere right to take possession, nor yet a right to all the goods in order to satisfy such claims. It is not easy to understand such a term in relation to a landlord to whom rent for one or more years is due. Until distress levied he has no actual right in the tenant's goods; he must distrain to acquire one; and having distrained (unless there be a replevin within five days or payment,) he acquires the right to sell."

But with great deference to the opinion of that eminent Judge, I venture to think that this passage is open to the criticism that it assigns too narrow a signification to the term for the purposes of a bankruptcy law. It appears to me that a creditor may, without any inaccuracy of expression, be said to have a lien upon goods, when he has a right to receive his debt out of their proceeds, or to prevent a disposition being made of them without payment of his claim. Full effect would thus be given to the words, "preferential lien," by holding the landlord entitled to be paid by the assignee out of the proceeds of the goods on the premises, which, but for the assignment or attachment, would have been liable to distress, and making the year's or six months' rent a charge upon the proceeds in priority to the claims of other creditors, or rather making the surplus only an asset of the estate available for distribution among other creditors. For my own part I have not been able to perceive any sound reason for thinking that where

the assignee has taken possession under an assignment or attachment, the goods are not *in custodiâ legis.* In whichever way taken the possession is invested with the same qualities; and even in form the attachment is strictly a process of execution issued in the name of the Sovereign out of a Court of competent jurisdiction.

But whatever may be the correct interpretation of the term "preferential lien," or whatever may be the exact measure of the rights it confers, I think we ought to hold that the 125th section prohibits the landlord from levying a distress upon the goods of the insolvent after they have come into the possession or custody of the assignee. Surely the distress is a remedy sought for enforcing a claim for a debt, privilege, or lien, and it can only be enforced by resorting to the seizure, which the statute expressly forbids. This is the view of the section taken in *Munro* v. *Commercial Building Society,* 36 U. C. R. 464, and is in conformity with the principles laid down by the Court of Common Pleas in *Blakely* v. *Hall,* 21 C. P. 138, when dealing with the right of an execution creditor in respect of his costs. I may also refer to the language of Hagarty, C. J., in *Re Kennedy,* 36 U. C. R. 473, where that learned Judge observes, "There is no privilege or preference given to a landlord for *rent* over and above any other claim. His only protection seems to me to lie in his right and power to enforce a preferential lien on property on the demised premises for a year's rent. The law does not allow property on the premises to pass into the hands of the assignee to the prejudice of the landlord's lien on such goods." The landlord there had not made a distress, but his claim was to be placed upon the dividend sheet as a privileged creditor. This was refused because it did not appear that there were any goods on the demised premises, which came to the possession of the assignee; but the learned Chief Justice does not appear to have entertained any doubt that if there were such goods, the assignee would have been bound to apply their proceeds towards the satisfaction of the landlord's claim. I gather

from the decisions in the United States that without the assistance of any specific enactment on the point, the current of authority is unmistakably in the same direction.

Now, if it be once established that the landlord's common-law right is frustrated by the assignee taking possession, it seems to me that the way is cleared of all serious difficulty. There is, then, little room for the contention that the existence of the lien is dependent upon the actual levy of a distress. If it were, it could arise so seldom that it would have scarcely been worthy of the special attention of the Legislature. It could never come into question except where the seizure was made so recently before the insolvency that the goods still remained unsold. Where they had been sold the right of the landlord to retain his rent out of the proceeds would not be affected by the Act, and would extend to arrears for the whole period allowed by the Statute of Limitations.

It was strongly pressed upon us that this contention is opposed to the decision in *Griffith* v. *Brown*, 21 C. P. 12, but the question of the right to make the seizure did not engage the attention of the Court. Its consideration was solely directed to the amount which the landlord could legally claim. Nor does the opinion I have expressed clash with the judgment of the Queen's Bench in *McEdwards* v. *McLean*, 43 U. C. R. 454, for there the seizure had been made before the assignment, and the point adjudicated was that the assignee could not take the goods out of the landlord's possession without paying the year's rent. This appears to me to be good sense and good law, but it lends no countenance to the proposition that the goods may be distrained when in the possession of the assignee.

Other considerations may readily be suggested in support of the right of the landlord to be paid out of the proceeds of goods which were at the time of the assignment upon the demised premises. One seems to me to be supplied by the language of the 74th section itself. The "preferential lien" is to cover the period during which "the assignee shall retain the premises leased." It is a

single right extending to the six months' arrears due before insolvency, and the subsequent rent until the assignee gives up possession. Take then the case of a rent reserved half-yearly, which had not fallen due at the date of the insolvency, but which falls due before the assignee has surrendered possession. Can it be supposed that the landlord is to rank with other creditors for the half-year's rent, and to have a preferential lien for the remainder of the time during which the premises are held by the assignee? Again, there would seem to be much ground for holding, that in the absence of statutory provision the landlord would be within the equity of the statute 8 Anne, ch. 14, which entitles the landlord to receive from the sheriff an amount not exceeding a year's rent. That seems to have been the opinion of Sir Wm. Blackstone, and although this doctrine has been overruled in England, that result was only arrived at because the goods were expressly made distrainable by statute notwithstanding the proceedings in bankruptcy. In *Ex parte Plummer*, 1 Atk. 103, Lord Hardwicke said, that there was a case before the Lords Commissioners of the Great Seal, where the landlord, though he had made no distress, yet was considered to be within the equity of the statute. There are decisions in the Supreme Court of the United States to the same effect.

I have already intimated my opinion that the order is not in the nature of a judgment against the assignee personally. But even if it were, I am not prepared to say that it would be erroneous. I see no valid reason for holding that the assignee is not subject to such an order, where he has disposed of the goods, and does not provide for the landlord's claim. It is unnecessary to consider the mode in which such an order should be enforced. As Mr. Hoyles pointed out, the case of *Arnitt* v. *Garnett*, 3 B. & Al. 440, shews that when a sheriff has not paid the landlord in compliance with the Statute of Anne, the Court has jurisdiction to make a summary order. It is immaterial that the assignee only obeyed the instructions of the in-

spectors in making this credit sale. They had not in my opinion any right to make a sale upon terms which were prejudicial to the landlord. If the law curtails his right of distress, the least it can do for him is to require a prompt realization of the assets for the satisfaction of his demand. It would be a great injustice if the other creditors could sell, and permit the removal of the goods upon any terms of credit that suited their interests, without regard to his rights.

Upon the whole, I am of opinion that the following propositions are well founded in reason and authority :—

1. If before the assignment or attachment the landlord has levied, the assignee cannot take the goods out of his possession without payment or tender of the six months' arrears.

2. After the assignee has taken possession, the landlord cannot seize, but he is entitled to be paid the six months' arrears out of the proceeds of the goods on the demised premises in preference to any other claim.

3. The landlord is not a privileged creditor, but is only entitled to a lien upon the proceeds of the goods of the insolvent, which he might have distrained: *Re Kennedy*, 36 U. C. R. 471.

4. If the assignee sells upon credit, he must arrange with the landlord before the goods are removed, otherwise he becomes liable to an order for immediate payment.

5. If the creditors or inspectors order him to make such a sale, and do not provide him with the means of satisfying the landlord, he should apply to the Judge for direction.

6. Whenever the assignee is remaining in possession unreasonably long without realizing and paying the landlord, the latter may invoke the summary jurisdiction of the Court.

Holding these views, I am of opinion that the appeal should be dismissed, with costs.

BURTON, J. A.—I also think the appeal should be dismissed, and but for the great divergence of judicial opinions,

both here and in the sister Provinces, upon the subject, I should merely have signified my concurrence; but in consequence of this great diversity of opinion I prefer stating the grounds of my decision.

I entirely agree with Mr. Justice Armour in the view expressed by him in a recent case, that the only point decided by the Court of Appeal in *Mason* v. *Hamilton*, 22 C. P. 411, was, that the landlord's lien was restricted to one year's rent, even when he had distrained before the insolvency, but had not sold. I also concur in the opinion expressed by him that the landlord's right to distrain will continue to exist notwithstanding the insolvency, unless taken away by positive enactment or by necessary implication from the words used. The Dominion Legislature has not attempted to interfere, and, indeed, could not interfere with the right of the landlord to distrain, except in so far as that right is attempted to be enforced, against the goods of the insolvent.

Every thing upon the premises is liable to be distrained, whether they be the effects of a tenant or a stranger, and this right arises in respect of the place where the goods are found, and not in respect of the person to whom they belong. The insolvency of the tenant, therefore, does not interfere with this right to distrain upon goods found upon the premises if they do not belong to the insolvent, but if they are goods of the insolvent which have passed into the possession of the assignee, the 125th section so far interferes with the right as to declare that the remedy must be by petition to the Judge, and not by seizure. Whilst, therefore, the right or preferential lien, as it is styled in the statute, still remains, the remedy is to be sought through the medium of the Insolvent Court.

It appears to me to be reasonably clear that the scheme the Legislature had in view was, that the estate and effects of the insolvent having once vested and come into the possession of the assignee, should be fully administered by the Insolvent Court and its officers, that the right is inter-

fered with only as affects the remedy and its restriction to six months.

No good reason can be suggested why any distinction should be drawn between a lien sought to be enforced under a chattel mortgage and a right of this nature. It is as important to the general body of creditors that the landlord's claims should be decided promptly on a summary application, as that the claim of any other creditor attempting to interfere with the possession of the goods should be so dealt with. It surely must in such a case be immaterial whether the remedy sought to be enforced is in assertion of a common law right, or by virtue of a contract.

Under the English Bankruptcy Act of 1869, the right of a landlord to distrain after the issue of a commission, or the presentation by a debtor of a petition for liquidation by arrangement, is clear, so that the case of *Ex parte Birmingham and Staffordshire Gas Light Co.*, L. R. 11 Eq. 615, cited by Mr. Martin, has no application. The 34th section of that Act, intended to preserve, with a certain limitation, the common law right of a landlord. In this country, instead of that being retained after the insolvency, the more convenient remedy has been provided of bringing the claim under the notice of the assignee, and procuring an order for its payment from the Court.

The case of *Ex parte Hill*, L. R. 6 Chy. Div. 66, shews that this was the view entertained of the provisions of the Bankruptcy Act by the Court of Appeal.

The case of *In re Stockton Iron Furnace Co.*, L. R. 10 Ch. Div. 335, affords us no assistance, as the distress in that case was before the bankruptcy.

But it is said that the assignee ought not to have been held personally liable, as it is contended he is by this order, and that the order is erroneous in that respect. This would at most be a mere question of costs, as although the application was originally made in April, the order complained of was not issued until July, when the assignee was in funds; but I do not consider that this is a personal

order on the assignee in the ordinary sense of that term. It is a direction to the assignee to pay the money, as it could not, I apprehend, be enforced by execution, but by motion to commit for contempt. Upon that motion it would be competent to the assignee to show if the facts warranted it, that there were no funds applicable to the payment of the claim. I am very far from saying that the facts in this case would have sustained such an answer; there being ample goods upon the demised premises, when the assignee became aware of the landlord's claim, it was his duty not to dispose of those goods without making provision for its due payment.

The 38th section, which provides for the sale of the estate of the insolvent by the assignee, expressly directs that in the event of a sale *en bloc* no such sale shall affect, diminish, impair, or postpone the payment of any mortgage or privileged claim on the estate or property of the insolvent, or any portion thereof; shewing the anxiety of the Legislature, whilst securing an equal distribution of the assets among the creditors, not to interfere with the rights of parties holding privileged claims.

Here the landlord being prevented by the terms of the Act from enforcing his remedy by distress, makes known his claim to the assignee, who promises to pay it but afterwards carries out a sale upon credit, thereby postponing the payment which the landlord could otherwise have enforced. No doubt the assignee could exercise a reasonable discretion in the realization of the assets having regard to the nature of the claims upon them, and it is unnecessary to decide here whether it would have been any answer to a motion for disobedience of this order that the assignee had sold on three months' credit. That must depend to a great extent upon the circumstances of each particular case. It does not, to my mind, arise on the present appeal. The order was, I think, correct at the time it was made, and I incline to think that even if it had been made in the same terms in April, it would have been no answer by the assignee for the non-compliance with it that the credit on

which the goods were sold had not expired. It was the duty of the assignee not to disregard the rights of parties who, but for the intervention of the insolvency, might have enforced their claim by distress and sale of the goods.

Whilst the landlord may, if he thinks proper, prove his claim under the 80th section, he is not bound to do so; but may enforce his remedy by petition under the 125th section. I confess that I was inclined to take a different view of the matter upon the argument, but further consideration has satisfied me that whilst the landlord's claim, whether attempted to be enforced by distress before insolvency or by petition subsequently, is restricted to six months previous to the insolvency and such further period as the assignee shall retain the premises leased, he is not bound to wait until the ordinary creditors receive their dividend.

It may be said that a great hardship might be inflicted on the assignee, who is bound to obey the inspector; but it is always open to him to apply to the Judge for protection.

I think, therefore, that the order made by the learned Judge in the Insolvent Court was correct, and that the appeal should be dismissed, with costs.

PATTERSON, J. A.—I desire merely, in addition to what has been said, to state for myself my opinion that the order, if a personal order against the assignee, which I think it was intended to be, is properly made in that form. I take the right of the landlord to be paid his six months' rent out of the goods on the premises to be a right superior to that of the general creditors, whose interests are under the care of the inspectors, and that the power of the creditors or the inspectors to direct a sale of the assets upon credit is confined to the assets, so far as the creditors are interested in them. When the goods have been removed from the premises and disposed of by the assignee, I think the landlord is entitled to be paid his rent, and that it is no sufficient answer to his demand to be told that the goods have been sold on credit, and that when the notes taken for

them fall due, and if they are paid, the rent will be paid. This is substituting for a lien on the goods the credit of the purchaser, whom the creditors or inspectors, without consultation with the landlord, have been satisfied to trust. In my view of the intention and effect of the Act, the landlord has a right to receive his money as soon as the goods are disposed of, and has therefore a right to a personal order against the assignee who has parted with the goods.

MORRISON, J.A., concurred.

Appeal dismissed.

McPHERSON V. McKAY.

Presbyterian Church of Scotland—Union—Congregational property—38 Vic. ch. 75, O.

In 1836, by letters patent, lands were granted to trustees in fee, to hold the same "to and for the benefit of the Presbyterian minister for the time being incumbent of the Presbyterian Church of Scotland, now erected in the township of Eldon." The defendant was incumbent of said church when, in 1874, as mentioned in 38 Vic. ch. 75, O., the several Presbyterian churches in Canada were united; but the members of this church decided not to enter into the union, in accordance with section 2 of the Act, which provided that, in such a case, the "congregational property of that congregation shall remain unaffected by this Act." The defendant, however, became a member of the united church. *Held*, affirming the decree of Moss, C. J. A., 26 Gr. 141, that the lands in question were congregational property within the meaning of sec. 2, and that the defendant, having joined the union, was no longer entitled as *cestui que trust* under the patent.

This was an appeal from a decree made by Moss, C. J. A., sitting for the Chancellor, reported 26 Gr. 141. The pleadings and facts are fully stated there, and in the judgments in this Court.

The case was argued on the 14th March, 1879. (a.)

Blake, Q. C., and *Maclennan*, Q. C., for the appellants. The property in question is not affected by the first and second sections of the Union Act, 38 Vic. ch. 75, O. as it is not property "belonging to or held in trust for or to the use of a congregation," as described in the first section; nor is it "congregational property of a congregation," as described in the second section. It is property held in trust, not for the congregation, but for the use and benefit of the minister. The property the Legislature meant to deal with in these sections was property over which the congregations had control, and which they could lease, mortgage, sell, &c., and which was held and regulated under the Acts respecting the property of religious institutions. This is apparent from the whole scope of the sections, and also from sections three and four, in the latter of which express reference is made to the Acts referred to. The first Act enabling congregations to hold property was 9 Geo. IV, ch. 2, and this was followed by 3 Vic. ch. 73, 8 Vic. ch. 15, 12 Vic. ch. 9, 13 & 14 Vic. ch. 78, 18 Vic. ch. 119, C. S. U. C. ch. 69, and 16 Vic. ch. 135, O. The land in question was granted in 1836, and was evidently not intended to come under the Act 9 Geo. IV. Under that Act the quantity of land which could be held by any one congregation was limited to five acres, a restriction which was not removed until 3 Vic. ch. 73, and in this patent there is no control of any kind given to the congregation, not even the power of electing trustees. It is clear that none of the subsequent amending Acts were intended to apply to property held upon such a trust as the present: *Re Methodist Episcopal Church Property of Churchville*, 1 Chy. Ch. 305. The appellant had an equitable estate for life in the land: 2 Bl. Com. 121; *Smith's* Real Property, 128; and the statute will not be construed to take away his estate or to give others the power to take it away without clear words. Before the Act the congrega-

(a) *Present.*—Burton, Patterson, Morrison, JJ.A., and Blake, V.C.

tion had no control, and as the Act does not give them control in express words, it will not be implied. There being a large and well-known class of property to which the statute in terms applies, the intention of the Legislature is satisfied, and its operation will not be extended by implication, so as to take away vested rights. While it might be reasonable to give congregations the power contended for over their own property, it would have been a most violent act of legislation to give this power over property which was not theirs at all. The fifth section of the statute is the one which applies to property. Not being congregational property, or subject to congregational control, the Legislature meant it to go into the union, and justly and properly so. The legal nature of the churches which entered into this union is shewn by the case of *Long* v. *The Bishop of Cape Town*, 1 Moo. P. C. N. S. 411-461, and other cases. They are voluntary associations formed to promote certain objects, and having a certain organization for the purpose of government. The union was the act of the legislative authority of the church in question; was entered into in order more effectually to carry out the objects of the association, and was within their powers; and although there was a change of name, the several bodies lost neither their identity nor their property by the union, but the identity of each is to be found in the united body, and all rights of property enjoyed by or in connection with any of them enured to the benefit of the united body. This was determined in *Doe Trustees Methodist Episcopal* v. *Brass*, 6 O. S. 437, affirming *Doe Trustees Methodist Episcopal Church* v. *Flint*, Mich. Term, 4 Vic. (unreported), which had reversed *the same same plaintiffs* v. *Bell*, 5 O. S. 344. Therefore the first and fifth sections of the Act were unnecessary, except as doing away with the inconvenience of proving the identity of the new body with the old, which the change of name might occasion. The property would have gone into the union without these sections. The effect of the union upon the status of ministers and congregations and people

is shewn by *Forbes* v. *Eden,* L. R. 1 Sc. App. 569. Those who were dissatisfied had no remedy but to withdraw: per Lord Cranworth, page 382; the appellant, therefore, and those members of his congregation who agree to the union, still belong to the same voluntary body as before; they have not left it or withdrawn from it, but are loyal members of their church. The appellant has not lost or changed the status by virtue of which before the union he enjoyed this property, and not having done so, but having maintained his allegiance, he is still the *cestui que trust* under this patent. The respondents, and those who agree with them, have withdrawn from the church, and if they have formed themselves into a congregation they are not the old body, nor any part of the old body; and if by virtue of the statute they could, by a mere majority, take away with them property in which they had an interest, and over which they had some control, it would be unreasonable that they should take away property in which they had no concern, and it is submitted that the Legislature has not given them power to do so. The vote taken in this case was illegal and void. By the second section of the Model Constitution the vote should have been of male persons of the full age of twenty-one years, who are members or adherents of the church, and professing their intention to support religion in the congregation, and residing within its bounds. There was no vote taken of this constituency: *Cowan* v. *Wright,* 23 Gr., 616; *Hall* v. *Ritchie, Ib.* 630. Even if the vote were good, the only effect of the Act in that case is declared to be that the property of congregations shall not be affected by it (section 2). If the legal effect of the union was to carry the property with it, the Legislature did not intend to prevent that, and if the Act is put out of the case, then the property went into the union on the authority of *Doe* v. *Brass* and *Doe* v. *Flint supra,* and the bill must fail.

Archibald McLean, for the respondents. Under the grant from the Crown, the respondents are entitled to hold the lands in question against every one except the *cestui*

qui trust named therein—"the minister for the time being incumbent of the Presbyterian Church of Scotland." Although the appellant duly entered into possession of these lands by virtue of his induction as the minister specified in the grant, he has since voluntarily separated himself from the Presbyterian Church of Scotland; and he is no longer entitled to the benefit of the grant, as a majority of the members of the congregation, by a vote legally taken, refused to enter into the union, as provided by 38 Vic., ch. 75. There still exists in the Township of Eldon, the congregation and church as incumbent of which the appellant entered into and occupied the lands in dispute; and being congregational property, in and by section 2 of the Act just referred to, the lands continue to be held by the respondents under the original trust. He cited *Attorney General* v. *Jeffrey*, 10 Gr. 273; *Doe dem. Galt* v. *Bain*, 3 U.C.R. 198.

January 13, 1880. PATTERSON, J.A.—The plaintiffs are trustees of 200 acres of land in the township of Eldon, under a patent from the Crown, dated 8th July, 1836, by which the land was granted "in trust to hold the same for ever hereafter, to and for the benefit of the Presbyterian minister for the time being incumbent of the Presbyterian Church of Scotland now erected in the said township of Eldon."

The question before us is, whether the defendant is or is not the *cestui que trust*.

The defendant was a minister of the Presbyterian Church of Canada, in connection with the Church of Scotland, and was regularly inducted as pastor of the congregation in Eldon. It is not disputed that the Church of Scotland, mentioned in the deed, meant the Presbyterian Church of Canada in connection with the Church of Scotland; and although the edifice referred to in the deed is said to have been replaced by another, which was built upon the land granted by the patent, no difficulty is presented by that circumstance, the defendant being understood on both sides as having been the incumbent for

whose benefit the lands were to be held, and to have been let into possession in that character.

The question has arisen by reason of the union of the Presbyterian Church of Canada in connection with the Church of Scotland with other Presbyterian Churches, which was effected in 1875.

As the discussion turns a good deal upon the Act passed in 1874, by the Legislature of Ontario, in view of the union then proposed, it will be convenient to note at once its various provisions.

The Act is 38 Vict. ch. 75.

The preamble recites that the Canada Presbyterian Church, the Presbyterian Church of Canada in connection with the Church of Scotland, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces had severally agreed to unite together and form one body or denomination of Christians under the name of "The Presbyterian Church in Canada:" that the Moderators of the General Assembly of the Canada Presbyterian Church and of the Synods of the other churches respectively, by and with the consent of the said General Assembly and Synods, had by their petitions stating such agreement to unite prayed that for the furtherance of that their purpose, and to remove any obstructions to such union which might arise out of the form and designation of the several trusts or Acts of incorporation, by which the property of the said churches, and of the colleges and congregations connected with the said churches, or any of them respectively, were held and administered, or otherwise, certain legislative provisions might be made in reference to the property of the said churches, colleges and congregations, and other matters affecting the same, in view of the said union.

Sec. 1 enacts, that as soon as the union takes place all property, real or personal, within the Province of Ontario, belonging to or held in trust for or to the use of any congregation in connexion or communion with any of the said churches, shall thenceforth be held, used, and administered,

for the benefit of the same congregation in connexion or communion with the united body under the name of The Presbyterian Church in Canada :

Provided always, (by sec. 2,) that if any such congregation shall, at a meeting held within six months after the union takes place, decide, by a majority of the votes of those entitled to vote at the meeting, not to enter into the union but to dissent therefrom, then, and in such case, the congregational property of that congregation *shall remain unaffected by this Act,* or by any of the provisions thereof. But in the event of the dissenting congregation resolving at any future time to enter into and adhere to the United Church, then the Act should apply to its property.

Sec. 3 empowers congregations to vary the provisions of their trust deeds or constitutions relating to the management of their affairs.

Sec. 4 relates to selling or mortgaging lands.

Sec. 5 declares that *all other property,* real, or personal, belonging to or held in trust for the use of any of the said churches or religious bodies, or for any college or educational or other institution, or for any trust in connection with any of the said churches or religious bodies, either generally or for any special purpose or object, shall from the time the contemplated union takes place belong to and be held in trust for and to the use of The Presbyterian Church in Canada, or for or to the use of the said college, educational or other institution or trust in connexion therewith.

Sec. 6 provides that all property affected by the Act shall, "save as aforesaid," be held and administered as nearly as may be in the same manner, and subject to the same conditions as provided in the deeds of trust, &c.

Sec. 7 makes provisions respecting the colleges.

Sec. 8 deals with a fund called the Temporalities Fund belonging to the Presbyterian Church of Canada in connection with the Church of Scotland, securing the enjoyment of the incomes derived from the fund to the individuals receiving them, for their lives, and making provision for the ultimate disposition of the fund.

Sec. 9 refers to funds for the benefit of widows and orphans of ministers belonging to two of the churches.

Sec. 10 regulates the taking of gifts and bequests.

And sec. 11 enacts that the union shall be held to take place so soon as the articles of the said union shall have been signed by the moderators of the respective churches.

The plaintiffs' bill alleges that the union contemplated in and referred to by the Act was consummated in June, 1875: that the defendant entered into the union and became and now is a minister of the united body known as the Presbyterian Church of Canada, and has separated himself from and ceased to be a minister of the Presbyterian Church of Canada in connection with the Church of Scotland.

The defendant by his answer admits that the union of the churches took place and that he is a minister of the United Church; but he denies that he has separated himself from the body to which he formerly belonged; and claims that, notwithstanding the union of his church with the others, it still exists in the united body as the same church.

Within six months after the union a vote of the Eldon congregation was taken at a meeting, (the regularity of which is not now contested,) and a majority of those entitled to vote decided not to enter the union, but to dissent therefrom.

These dissentients claim to be the congregation of the Presbyterian Church of Canada in connection with the Church of Scotland. There is still a congregation to whom the defendant ministers, being the minority who were in favour of the union.

Several questions touching the effect of the Act of 1874 have been argued.

For the appellants it has been contended that the property in question is not congregational property within the meaning of sections one and two, but that, if it comes within the Act at all, it is of the class covered by section five. It will be noticed that the statute deals very differently with these two classes of property. Under section

two the dissenting vote of this congregation would render the Act inoperative as to any property which under the general provisions of the first section would have been preserved to the congregation after it had joined the union; while all the property dealt with by section five is absolutely transferred to the United Church.

Section one professes to affect all property, real or personal, "now belonging to or held in trust for or to the use of any congregation." Section two excludes from the operation of the Act, in case of a dissenting vote of a congregation, "the congregational property of the said congregation." It is argued that the land now in question, being held in trust for the pastor of the congregation, and not being within the power or control of the congregation, is not within the language or the scope of these sections, but forms part of the "other property" disposed of by section five, or is untouched by the Act.

The alternative last suggested is, I think, quite inadmissible. It is plain from the language of the preamble that the object of the statute was to clothe the United Church, or the institutions or congregations connected with it, with all the interests in property of every kind which had been enjoyed by the churches, institutions or congregations respectively before the union; and property held under trusts such as those declared in this patent must not be taken to have been overlooked, unless it cannot by any reasonable construction be brought within the provisions of the Act.

The Act carefully distinguishes two classes of property, namely, that in which individual congregations are interested, and that belonging to the church at large. It is to the latter class that section five relates, and the benefit of which it carries to the United Church, notwithstanding the refusal of individual congregations to come into the union.

Section two is evidently framed for the purpose of avoiding the injustice of depriving a dissenting congregation of the benefit it had enjoyed from any property dedicated to its use as a congregation, and of preventing

what would otherwise have been felt to be an arbitrary and oppressive result of the legislation.

It matters little to a congregation, whose heaviest burden is the support of its minister, whether the fund out of which he is supported is said to belong to the congregation or to the minister. A grant in trust for the incumbent for the time being, and which is enjoyed by the incumbent only in the character of incumbent of the church, may, without violence to the language of section one, be held to be "in trust for or to the use of the congregation;" and I take the varied form of expression used in section two—"congregational property of the said congregation,"—not to be intended to limit the more general phrase used in the former section, but to be intended, (while perhaps made tautological by aiming at being very explicit,) to guard against the section being construed to extend beyond the class of property in which the congregation alone was concerned, and to embrace the class covered by section five.

I am clearly of opinion that this property is congregational property within the scope of sections one and two.

Then taking the property to be congregational, it is insisted on behalf of the appellant, as the true construction of section two, that the dissent of the congregation evidenced as that section requires, and as was done in this case, removes the property from the operation of the statute, and leaves its tenure to depend on the terms of the trusts on which it is held, read with relation to the events which have happened, just as would have been the case if the Act had not been passed. I accede to this contention. It gives their natural force and meaning to the words employed, and is consistent with the evident object to avoid, as far as possible, giving cause to those who did not cordially concur in the union of the churches to complain of harshness or injustice.

It is scarcely necessary to remark that the ecclesiastical union of the churches is not effected by or dependent on this Act of Parliament. Each church was a voluntary and independent association or organization, not known to the

law as a body corporate or politic, not in any way controlled by or existing under the authority of the Legislature, although recognized by the Legislature as an existing organization. In enacting general laws such as those relating to the property of religious institutions, and in passing special statutes like the one we are now considering, the Legislature deals only with property and civil rights, and does not assume jurisdiction over the ecclesiastical body. The last section of the statute must not, therefore, be understood as giving legislative effect to the union, or as doing more than fixing the date for the operation of those of its provisions which are limited to take effect "from and after the union." It achieves this object by designating the signature of the articles as the event which is to shew that the union has taken place. And section two respects the voluntary nature of the associations in leaving each congregation free to decline to enter the union by enabling it to retain the property it possesses, unaffected by any of the provisions intended only to facilitate the arrangements of those desirous of uniting.

We have then to determine the title to this property by reference to the terms of the patent.

The trust is, "to and for the benefit of the Presbyterian minister for the time being incumbent of the Presbyterian Church of Scotland now erected in the township of Eldon." The religious body here referred to was, as we have seen, the Presbyterian Church of Canada in connection with the Church of Scotland. A minister of that Church, being the pastor of the Eldon congregation, was the *cestui que trust.* The question which now remains is whether this defendant answers that description. The argument is, that although the church has formed the union with three other churches, constituting now a part of the body called the Presbyterian Church of Canada, its indentity is not lost or merged. It is urged in effect that there were, in the old Province of Canada and in the Maritime Provinces, four branches of the Presbyterian Church: that, using the word Church in its broader signification as em-

bracing all those who adhered to the Presbyterian system, those four bodies may be said to have already constituted the Presbyterian Church in those parts of the Dominion: and that in forming one united organization in place of four independent bodies, they each, like the members of a partnership, retain their individual existence.

The functions of a Court of law exclude the discussion of the doctrines, government, or discipline of voluntary religious associations, except when they become elements in the adjudication of controversies respecting property, contracts, or other civil rights. The attempt to deal with such questions is always a matter of delicacy, and cannot be undertaken with any confidence without ample information upon all the topics which require consideration. When it becomes necessary, however, the duty must be discharged as best it may, and as has been done in many cases, including, amongst those which have been cited to us, the case of *Forbes* v. *Eden*, before the House of Lords, L. R. 1 Sc. App. 569; and the early cases in our own Court of Queen's Bench of *Doe ex dem. Trustees of the Methodist Episcopal Church* v. *Bell*, 5 O. S. 344; and *the same plaintiffs* v. *Brass*, 6 O. S. 437.

In the present case, if we were called upon to form a judgment upon a comparison of the Presbyterian Church in Canada with any one of the four churches of which it is composed, I fear we should find our materials very scanty. Evidence was given upon some points touching the tenets of the new church, but not with the view of affording a full exposition of them. If it ought to be assumed that each uniting church retained in the union its faith and practices, the assumption would be useless unless we knew what was held by each, or at least that they all held alike. We have no such information, and if we refer to their names for indications of their character, we learn only that they are Presbyterian, (or that three of the four were so, for one of them did not include the word Presbyterian in its title,) but we have no judicial knowledge of what that word implies, or that the Presbyterian

form of government may not have been all they held in common.

The information we have relates chiefly to the Presbyterian Church of Canada in connection with the Church of Scotland. What was the exact nature of the connection does not seem to have been at first very precisely defined. Extracts from the minutes of the proceedings of the church were produced. From these it appeared that in June, 1831, a convention which met at Kingston, and comprised ministers and elders in connection with the Church of Scotland, resolved that its members should form a Synod, to be called the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, leaving it to the Venerable the General Assembly (of Scotland) to determine the particular nature of the connection which should subsist between that Synod and the General Assembly of the Church of Scotland. This appears to have been communicated to the General Assembly by a memorial of the newly formed Synod, which submitted to the General Assembly the determination of the precise relation which the Synod should have to that venerable body, and withal craved the counsel of its mature experience, and the aid and encouragement which it might be able to extend towards the memorialists. The response to this, or, at all events, the only utterance of the General Assembly which is in evidence, appears in an entry in the minutes of the Synod, under date, York, 5th August, 1833, embodying what is called an extract from a declaratory enactment of the General Assembly, the date of which is not given, and which declares " that a standing committee shall be named by the General Assembly to correspond with such churches in the colonies, for the purpose of giving advice on any question with regard to which they may choose to consult the Church of Scotland, and affording them such aid as it may be in the power of the committee to give, in all matters affecting their rights and interests." This is all we are told of the history of the church previous to 1836, when the patent for the land was issued.

It is then shewn that in 1844, the year after the disruption in Scotland, and when the church here was threatened with a similar division, the synod formally asserted its independence of the Church of Scotland as well as of all other control. On the 6th of July, 1844, certain resolutions were adopted, the substance of which was embodied in an Act passed by the synod in September of the same year, and entitled "An Act declaring the spiritual independence of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland." This Act declared that the synod had always claimed and possessed, did then possess, and ought always in all time coming to have and exercise a perfectly free, full, final, supreme, and uncontrolled power of jurisdiction, discipline, and government, in regard to all matters ecclesiastical and spiritual, over all the ministers, elders, church members, and congregations under its care, without the right of review, appeal, complaint, or reference, by or to any other Court or Courts whatsoever, in any form or under any pretence. * * "And whereas," it continues, "the words in the designation of the synod, 'in connection with the Church of Scotland,' have been misunderstood or misrepresented by many persons, it is hereby declared that the said words imply no right of jurisdiction or control in any form whatever by the Church of Scotland over this synod, but denote merely the connection of origin, identity of standards, and ministerial and church communion. And it is further enacted and declared that supreme and free jurisdiction is a fundamental and essential part of the constitution of this synod; and that this may be fully known to all those who may hereafter seek admission into our church, it is enjoined that all the Presbyteries shall preserve a copy of this Act, and cause it to be read over to and assented to by every minister and probationer who may apply for ordination or induction into any pastoral charge."

It thus appears that from the year 1844, whatever may have been the case before that, there was this explicit definition of the relation between the churches, and that

was assented to by the defendant who was ordained or inducted into the pastoral charge of the Eldon congregation at a later date.

The Declaration or Act of Independence, although its immediate occasion seems to have been to explain the connection with the Church of Scotland, is not confined to that object; but asserts the freedom of the synod from control by any Court whatsoever. The defendant puts this in evidence for the purpose, as I gather from the report, of shewing, in conjunction with the testimony of Professor McKerras, that the so-called connection with the Church of Scotland was not essential to the constitution of the church, and that whatever benefits were derived from the connection in the way of religious sympathy, ministerial communion, or substantial pecuniary aid, had been also accorded to the united church, or probably would be so. But the evidence shews more than this. It is impossible to speak, as the witness does, of both churches being in receipt of moneys from what may be styled the parent church, and of the latter recognizing both parties and assuming a position of neutrality between them, and at the same time to grasp the idea of the old church having ceased to exist except as an element in the new combination.

The question so elaborately investigated in *Doe* v. *Bell*, 5 O. S. 344, and the other cases which arose out of the change in the Methodist body from its Episcopal government to a different kind of superintendence, and its connection with the English Wesleyan Methodists instead of with the church in the United States, was not the same which is involved in this controversy. The decision that a religious association may adopt constitutional changes without destroying its own identity may be held to apply to bodies like the synods of these Presbyterian Churches without conceding that amalgamation with other associations, so as out of many to form one, leaves the identity of each unchanged, when the one so formed absorbs the individuals so completely as to leave no function which any one of them can perform independently of the others; unlike the confederacy which

takes *E pluribus unum* for its motto, in which each state has its separate autononomy while it is a component part of the whole.

If identity with the several churches can be predicated of the united church, it must be on the ground of perfect, or at least essential, coincidence in the tenets of the separate churches. As already remarked, we have no evidence that such coincidence existed; and it is a matter of common knowledge that grave differences in doctrine and in modes of worship and procedure may be discovered in churches which agree in adhering to the Presbyterian form of church government. In Ireland, and elsewhere, we have examples of opposing views on what are deemed essential points of belief maintained by different churches which agree in being Presbyterian; and we are all aware from what passes under our observation that on less vital questions, such as psalmody and other adjuncts of public worship, there may be differences of opinion, or varying forces of conviction, or possibly of prejudice, so marked as to form distinctive characteristics of the churches in which they prevail. But if we set aside these considerations, and assume a substantial agreement between the different churches in all material particulars, we are still far from establishing their identity, or proving that after a union each can be treated as still in existence. Apply the hypothesis to the Canada Presbyterian Church and the Presbyterian Church of Canada in connection with the Church of Scotland. Assume that they were undistinguishable in all their tenets, both as to doctrine and government. It would scarcely be contended, after the decision of such cases as *The Attorney General* v. *Jeffrey*, 10 Gr. 213, that a congregation passing from one to the other had not left its church. I do not see that the principle is changed by the circumstance of the union, so as to make similarity of tenets the test of the identity of the churches.

It seems to me that the principle of entire independence, which the defendant has proved, by the evidence he has adduced, to have been a fundamental principle of the

church of which he was a minister, forbids us to recognize the same church in a body in which the jurisdiction is shared with several other churches. If we recognize one of the united churches as still existing, we must recognize them all, and the result I have just indicated follows. If we are to treat them all as merged in one united church, *cadit quæstio.*

Then I turn again to the statute. While it leaves this congregation untouched, it shews what the churches themselves thought of the union, and where and why they deemed legislation necessary. They desired to have removed the obstructions to the union arising out of the form and designation of the trusts or Acts of Incorporation by which the property of the churches, colleges, and congregations, was held. One does not readily see what obstruction would be found in a conveyance in trust for the congregation attached to a particular church, if no change of church connection was to be worked; yet this is evidently the character of the obstruction anticipated. Then when, in the arrangement made in compliance with the petition of the churches, provision is made for dissenting congregations being left unmolested, the inquiry naturally arises to what churches were these congregations which refused to enter the union supposed to belong.

I confess some embarrassment from this question. It is not very easy to explain in precise terms how a church can unite with another, and yet a congregation of that church can keep out of the union and still belong to the church. Yet we cannot think of a Presbyterian congregation unattached to some Presbyterian Church, and there is no suggestion to be gathered from the statute that the dissenting congregations were regarded as ceasing to be Presbyterian congregations, or as ceasing to belong to the churches of which they had hitherto formed portions. It is not necessary for the disposition of this case to arrive at a precise understanding on this point. The plaintiffs, having the legal estate, are entitled to succeed against this defendant, unless he is their *cestui que trust.* The onus is

on the defendant to shew that he is still a minister of the Presbyterian Church of Canada in connection with the Church of Scotland; and, therefore, if that church has ceased to exist, he fails, whatever may be the difficulty in ascertaining the position of the congregation.

My own opinion is, that we can best deal with the matter by regarding it very much as a question of congregations. If a majority of the congregations represented in their general assembly and synods, sufficiently large and influential in the judgment of those venerable courts, to justify so grave a measure, decided upon union, the Legislature consented to give effect to that decision by vesting in the united body (sec. 5) all the property held by the several churches for general church purposes; and (sec. 1) enabled the congregations adhering to the union to carry with them their congregational property; but (sec. 2) sanctioned no interference with the property of such congregations as decided not to unite. This seems to me to have been the essence of the scheme presented to the Legislature and acted upon in passing the statute, and in my judgment it involves the recognition by the petitioning synods of the dissenting congregations as continuing in communion with their original churches.

I think that from whatever point of view the question is approached the result is the same; and that we must hold that the defendant is no longer the person described in the patent as incumbent of the Church of Scotland erected in the township of Eldon, as he has ceased to belong to the Church thus described; and that, therefore, this appeal must be dismissed, with costs.

Morrison, J.A.—I agree that the decision appealed against must be affirmed. I have had the advantage of perusing the judgment in this case of my brother Patterson, and as I concur entirely in the view he has taken, it is unnecessary for me to go over the grounds upon which his judgment is rested. I will only observe that it is clear to my mind that the land in dispute is

congregational property, within the intent and meaning of the second section of 38 Vic. The congregation in question belonged to, and still adheres to, the church organization or body known as the Presbyterian Church of Canada in connection with the Church of Scotland, and which existed at the time of the granting of the letters patent; and it is also clear that within the period limited by the 38 Vic., the congregation determined not to enter into the union mentioned in that statute, and signified its dissent therefrom.

The defendant, at the time of the union, was the minister or incumbent of the congregation in question, and, as he himself admits, was appointed to such congregation as a member and minister of the Presbyterian body to which the congregation belonged, viz., the Presbyterian Church in Canada in connection with the Church of Scotland. Some months after the union was effected, and after the congregation had signified its dissent from the union, the defendant became a member of the new body or denomination of Christians mentioned in 38 Vic. as "The Presbyterian Church in Canada"; in other words, the defendant voluntarily separated himself from his congregation after they had determined to remain as they were—a church in communion or connection with the Church of Scotland. There now exists two distinct Presbyterian bodies; one represented, I may say, by the plaintiffs, as a Church in connection with the Church of Scotland; the other by the defendant, as a church claiming no such connection; the former governed by a Synod, the latter by a General Assembly and other Presbyterian Church Courts. Under these circumstances, I cannot see any tenable ground upon which the defendant can consistently claim to be the incumbent of the congregation in question, and entitled to the benefit of the trusts, within the intent and meaning of the letters patent.

On the whole, I am of opinion that the decree pronounced by the learned Chief Justice was correct, and that this appeal should be dismissed.

BLAKE, V. C.—I think it is reasonably clear that the property in question, under the patent, is congregational property. It is the holding the office of incumbent of this church that gives any right to the land. The trustees are to benefit the church by holding the premises for the benefit of him, for the time being, incumbent of the church. It is by virtue of that relationship that the incumbent, for the time being, obtains a benefit from the land, and when the relationship ceases, with it the interest in the land in his favour ends. This being so, it is not covered by the general language of clause five, which refers to "all other property, real or personal."

I think it is also reasonably clear that the congregation has fulfilled the requirements of the statute so as to enable it to claim the land which passed, but conditionally, from it. As the congregation duly voted itself out of the union, it carried with it the congregational property, which would otherwise have passed into the united body.

If evidence had been given to shew the government of the Presbyterian Church, a very difficult question might have been raised as to the effect of that which, independently of the statute, becomes a voluntary union of these various associations. But there is nothing to shew the polity of the Presbyterian Church; and we cannot, therefore assume that there are bodies in these churches which have the power of controlling the congregations and of withdrawing from them property which has been given in trust for them individually.

I do not find that there is anything proved before the Court to warrant the withdrawal of this property from the plaintiffs, the trustees thereof, and therefore, that the decree made should be affirmed, and this appeal dismissed, with costs.

BURTON, J. A. concurred.

Appeal dismissed.

GREENE V. THE PROVINCIAL INSURANCE COMPANY.

Deposit by Insurance Company—Creditors entitled to rank thereon—Jurisdiction of Assignee—31 Vic. c. 48, D.—38 Vic. c. 20, D.

The defendants were licensed under 31 Vic. c. 48, D., to transact fire and inland marine insurance, while their original charter authorized the transaction of fire and marine insurance, without distinction of ocean from inland marine.

Held, affirming the decree of Proudfoot, V. C., 26 Gr. 354, that the holders of ocean marine policies, though resident in Canada, were not, on the insolvency of the defendants, entitled to rank as creditors on the fund deposited with the government of Canada.

Under that Act, companies confining themselves to Ocean marine insurance were not bound to make a deposit or obtain a license.

Held, also, that under 38 Vic. c. 20, D., it was the duty of the assignee to determine the right of the policy holders to rank upon the deposit; and not merely to report the claims proved.

In construing an obscure clause in an Act of Parliament, the Court may look at the title for assistance.

This was an appeal from a decree of Proudfoot, V.C., reported 26 Gr. 354. The facts are fully stated there.

The case was argued on the 11th September, 1879 (*a*).

M. Millar, and *C. R. W. Biggar*, for the appellants. The assignee had no jurisdiction to determine the right of Canadian holders of policies issued by the Provincial Insurance Co. in respect of ocean risks to rank as creditors upon the proceeds of the government deposit. But assuming that he had jurisdiction he should have simply reported whether the appellants had proved their claim, and the amount of such claim, and whether the appellants are or are not the holders of policies issued by the company to policy holders in the company in Canada. The Provincial Insurance Co. was chartered for ocean as well as inland marine business without distinction, and the license in respect of a portion of its business did not impress the deposit made for the purpose of obtaining that license with a trust in favour of any particular class of policy holders. Moreover the deposit in question having been taken out of the

(a) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

general funds of the company formed by receipt of premiums from ocean as well as inland marine and fire business without distinction, it would be inequitable and contrary to the spirit and letter of the statutes in that behalf to hold that it is now applicable to the payment of only one class of creditors of the company.

McCarthy, Q.C., and *A. P. Creelman*, for the respondents. The assignee received his appointment as assignee from the Court of Chancery of Ontario, pursuant to the provisions of and under the authority vested in that Court by the Act 38 Vict. ch. 20, D., entitled "An Act to amend and consolidate the several Acts respecting insurance in so far as regards fire and inland marine business," and the object of his appointment was to ascertain the claims against the insolvent company forming a charge upon the deposit made with the Receiver-General of Canada, pursuant to section 6 of that Act; and when ascertained to report on such claims to the Court of Chancery, in order that the proper directions might be given by that Court for payment of such claims out of the proceeds of the said deposit, so far as the same might be sufficient for that purpose: Act 38, ch. 20 secs. 16 and 17, Canada. The Court of Chancery is required by sec. 17 of the Act to distribute the proceeds of the deposit amongst the claimants according to the schedule or report of the assignee; therefore the schedule or report should embrace only such claims as the assignee shall find to be charges on the deposit. The assignee having found that the claim of the appellants being an "ocean marine claim," was not a charge on the deposit, was right in refusing to enter the same upon the schedule or to entertain the claim at all. The object of the company in making the deposit in question, was to secure a license for the transaction in Canada by the company of a fire and inland marine insurance business, and no license or deposit is necessary for the transaction of an ocean marine insurance business in Canada: Secs. 1 and 2, 38 Vict. ch. 20, Canada. From the title and whole scope of the Act, it is clear that the Legislature

intended the deposit to be for the benefit of creditors claiming under fire or inland marine policies, and that claimants under ocean marine policies have no claim upon the deposit.

January 14, 1880. MOSS, C. J. A., delivered the judgment of the Court.

The first position taken by the appellants is, that the assignee exceeded his jurisdiction in assuming to adjudicate upon the right of holders of ocean marine policies to rank as creditors upon the deposit made by the company before receiving the license necessary for the transaction of business under the statute. It is contended that his duty was limited to reporting the amount of the claims which the appellants had proved, and did not extend to determining their title to participate in the proceeds of the securities held by the Receiver-General.

I concur in the opinion of the learned Vice-Chancellor, that the assignee was strictly within the limits of his proper functions in reporting as he did. He received his appointment through a decree in the Court of Chancery, by which it was declared that the company was insolvent within the meaning of the Dominion Statute, 38 Vic. ch. 20, and that the deposit was liable to distribution, pursuant to the statute, among the creditors who are holders of claims in respect of policies issued to policy holders in Canada. His appointment is expressed to be made in pursuance of and for the purposes of the statute.

Now, the 16th section provides that in case of insolvency the deposits made by the company shall be applied *pro rata* toward the payment of all claims duly authenticated against the company upon policies issued in Canada, and that the distribution of the proceeds may be made by order in Chancery.

The 17th section requires the assignee to call upon the company to furnish a statement of all its outstanding policies in Canada, and upon all such policy-holders to file their claims, and upon the filing of the claims before him

the parties interested are to have the right of contestation thereof, and a right to appeal from his decision to the Court, according to its practice.

Before whom, then, is the contestation to take place? No one else can be meant but the assignee, and it is from his decision that an appeal lies to the Court. The appellate forum is one of the provincial Courts, which are very differently constituted in the various provinces. There is no trace of an intention that an officer of one of these Courts, discharging functions similar to those of the Master in Chancery, is to settle the mode of distributing the proceeds of the deposits, subject to revision by the Court. Indeed, it may well be that in some of the designated Courts there are no officers exercising similar functions. I think that the whole tenor of the provisions points unmistakably to the assignee, as the primary judicial officer for arranging the scheme of distribution. But after all this question is now of no practical importance. It would be an idle ceremony now to refer the dispute to the Master, who would feel himself bound to act upon the opinion expressed by the Vice-Chancellor.

The substantial question involved is, whether the holders of ocean marine policies are entitled to participate in the benefit of the deposit, and, as the Vice-Chancellor has pointed out, is by no means easy of solution in view of the complex legislation upon the subject. A careful consideration of the various statutes has satisfied us that the learned Judge was right in supporting the assignee's decision, that the claimants upon ocean marine policies are not entitled to rank upon the deposit.

Our attention was directed upon the argument to the various statutes which constituted the charter of this company, but we do not perceive that they place the appellants in any better position than the holders of ocean marine policies in any other company subject to the provisions of 38 Vic. c. 20 D. The company was originally created by the statute 12 Vic. ch. 167. The stock was divided into two classes, the mutual and the proprietary. The mutual stock

consisted of premium notes deposited for the purpose of mutual insurance, together with all payments or other property received or held therein or in consequence of such mutual insurance; the proprietary of stock in shares subscribed and paid for the purpose of general assurance of the property of other parties. Power was given to effect contracts of insurance against loss by fire on real and personal property, and to make insurances on vessels of all kinds and for any voyage, and to make insurances on lives and to grant annuities. Every mutual member was bound to pay his portion of all losses and expenses happening or accruing in the mutual branch. It seems plain that it was contemplated that the mutual business should only extend to the insurance of buildings. The powers thus conferred were wide enough to authorize the engaging in ocean marine insurance, and it is quite true that the holders of such policies were placed on precisely the same footing as all others in the proprietary branch, but in view of the subsequent legislation this circumstance seems to be of no importance. It was a natural incident to the transaction of a general business, and by no means peculiar to this company. It has, therefore, no special significance when rights to the deposit required at a later date by the legislature have to be considered.

By an amending Act passed in 1853 (16 Vic. ch. 69) the proprietary stock was increased, and the powers of the Mutual branch enlarged. It was also provided that such portions of the moneys and securities received by the company on account of the life branch as should be set apart as applicable only to losses in that branch, should in future be only applicable to losses sustained upon policies in that branch. That only authorized the creation of a fund for improving the security of a particular class of insurers, and does not affect the present question. No doubt it recognizes the general principle that the receipts of the company formed a general fund for the payment of losses, but that would have been the legal inference before, as well as after, the statute.

The other statutes relating specially to this company (18 Vic. ch. 213, and 26 Vic. ch. 58,) contain no provision which throws any light upon the controversy. We may, therefore, proceed to consider the enactments by which rights in the deposit are regulated, and in order to clearly apprehend the position it is necessary to trace the course of legislation on the subject.

The first statute (23 Vict. ch. 33) only related to companies not incorporated within the province, and it provided that such a company should make a deposit before receiving a license, and that upon insolvency this deposit should be applied *pro rata* towards the payment of all claims duly authenticated, alike as to losses and premiums on risks unexpired, or on policies issued in the province. Upon the construction of this enactment it was held by Mowat, V. C., that the object was that the deposit should be a security to Canadian policy-holders, and not to the general creditors in the province. This does not seem to me to aid the contention of either party, because the deposit under that statute was manifestly impressed with a trust in favour of Canadian policy-holders.

The next statute to which it is necessary to refer is 31 Vic. ch. 48, D. By the 2nd section it is provided that, except companies transacting ocean marine business exclusively, it should not be lawful for any insurance company to issue any policy, or take any risk, or receive any premium, or transact any business of insurance in Canada without first obtaining a license, which was to specify the business to be carried on by the company, and to be granted upon a proper deposit being made. The amount of the deposit was fixed by the 4th section at not less than $50,000 for every life, fire, inland marine, guarantee, or accident insurance company, and there was an express prohibition against the granting of a license until the deposit was made, except in the case of companies carrying on the business of life or fire insurance, or of inland marine insurance, or both the latter, which companies were permitted to make their deposits in three equal annual instal-

ments. It is quite apparent from these provisions that ocean marine insurance companies confining themselves to that branch of the business had full liberty to carry it on without making a deposit or receiving a license.

The 5th section, which requires special consideration, enacted that when any company carried on more than one description of insurance business, it should "make a separate deposit as aforesaid for each branch of its business," with an exception in favour of a company combining life and accident, or fire and inland marine business, which was only required to make one deposit for each such combination of two branches of business. Now, upon arriving at that point in the statute, I think the idea clearly presented to the mind of the reader would be that a separate deposit was required in each branch for the security of persons insured in it, and that they were entitled to resort to it in preference to all other claimants. I can conceive no other object for requiring separate and distinct deposits. The Vice-Chancellor has clearly illustrated this by pointing to the case of a company transacting a life and a fire business, and making a deposit in each branch. He thinks that it could not have been successfully contended that a life policy could rank on the fire deposit, nor *vice versâ* In this view I entirely concur, and have nothing to add to the reasoning of the learned Judge.

But it is urged that he did not pay sufficient regard to the 16th section, which provides for the application of the deposit upon the happening of insolvency. The language of the section is identical with that which engaged the attention of the Court in *Re Ætna Ins. Co. of Dublin*, 17 Gr. 160, but, as I have already observed, there was no question there between different classes of policy-holders. The learned Judge was far from overlooking that section. On the contrary, he holds, and as I think correctly, that its general language is subject to the qualification, that the deposit shall be applied for the benefit of those claiming against the branch in respect of which it was made. Under this Act the company made a deposit, and was licensed

in 1868 to transact fire and inland marine insurance business.

The next statute to which it is necessary to refer is 38 Vic. ch. 20, D., which is entitled "An Act to amend and consolidate the several Acts respecting insurance, in so far as regards fire and inland marine insurance business." It is urged that we are not at liberty to regard the title, when examining the provisions of the enactment; but this is stating the rule too broadly. No doubt the language of the title cannot enlarge or abridge the clear effect of plain and unambiguous language used in the enacting part, and, in strictness, therefore, it cannot be said to affect the question of construction.

In the late case of *Clayden* v. *Green*, L. R. 3 C. P. 511, Willes, J., expressed his opinion that the change in the mode of recording statutes by printing them on vellum, instead of engrossing them on a roll, cannot affect the rule which treated the title of the Act, the marginal notes and the punctuation, not as forming part of the Act but merely as a *temporanea expositio,* and added p. 522: "The Act when passed must be looked to just as if it were still entered upon a roll, which it may be again if Parliament should be pleased so to order, in which case it would be without these appendages, which, though useful as a guide to a hasty enquirer, ought not to be relied upon in construing an Act of Parliament."

But this does not exclude the rule, which I take to be also settled, that the Court may properly look at the title when engaged in the task of construing an obscure passage or expression in the Act. I am not aware that any doubt has been cast upon the proposition laid down by Lefroy, C. J., in *Shaw* v. *Ruddin*, 9 Ir. C. L. R. 214, that although the title cannot be made use of to control the express provisions of the Act, yet if there be in these provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered in order to assist in the interpretation of the Act, and thereby to give to the doubtful language in the body of the Act a meaning consistent

rather than at variance with the clear title of the Act. The rule thus guarded I conceive to be in entire accord with the views acted upon by the Court of King's Bench in *Ex parte Steavenson*, 2 B. & C. 34, and by Sir John Nicholl in *Brett* v. *Brett*, 3 Add. 210. If it were necessary this rule might well be applied against the appellants, for they are compelled to argue that certain clauses in the Act are so vague, wide, and general that they *may* include the holders of ocean marine policies. At least that is the essence, although perhaps not the form, of the argument. But in my opinion it is not necessary to look at the title, for it appears to me that the whole scope of the enactment shews to a demonstration that Parliament was not legislating in respect of ocean marine insurance. It placed no disability upon companies desiring to transact such business, and conferred no benefit upon those who dealt with them. It left insurers and insured in the case of ocean risks just where it found them, except that it permitted even a fire or inland marine company to take ocean risks without making a deposit, which the Act of 1868 did not allow.

It is not a difficult task to point out inaccuracies of expression in the statute, but they do not appear to me to prevent us from clearly understanding its general purport. For example, the reference to ocean marine companies in the commencement of the 3rd section is not a little singular. It is: "Except * * companies transacting, in Canada, ocean marine business exclusively, it shall not be lawful for any insurance company to accept any risk or issue any policy of fire or inland marine insurance." It is not very easy to see how a company characterized as transacting ocean marine business exclusively could accept fire or inland marine risks without losing its character, but the origin of this incongruity is not far to seek.

The statute of 1868 enacted that except companies transacting in Canada ocean marine business exclusively, it should not be lawful for any insurance company to issue any policy of insurance, or take any risk, or receive any pre-

mium, or transact any business of insurance in Canada without a license. This was simple and intelligible. But the draftsman of the statute of 1875, while using this as his model, had his mind fixed upon the fact that he was only dealing with fire and inland marine insurance, and therefore introduced these words as descriptive of the risks without perceiving that their introduction rendered it unnecessary to retain the exception as to companies transacting an ocean marine business exclusively. But whatever verbal criticisms may be fairly made, I think there is nothing in the scope of the Act to warrant the supposition that the Legislature designed to effect any change in the policy of making the deposit in respect of each branch a security for those insured in that branch.

It is argued that the 15th section shews that every policy holder is entitled to look to the security, because it enacts that whenever notice is served upon the Minister of Finance arising from loss insured against in Canada remaining unpaid for sixty days, or of a disputed claim after final judgment, *so that the amount of securities representing the deposit is liable to be reduced by sale of any portion thereof*, the license shall be void. This, it is urged, shews that the deposit is liable to ocean marine policy holders, because theirs is a claim which may be the subject of a final judgment. But this seems to assume the very point in dispute by taking it for granted that such a judgment would affect the fund, while the statute only refers to judgments which are of a character to affect the fund. This, too, is apart from the consideration that it is not easy to see how the securities deposited with the Receiver-General could be sold under any execution.

There is no reason for applying to the 16th section a different construction from that already placed upon the similar clause in the statute of 1868.

I shall not attempt to add to the observations of the Vice-Chancellor upon the whole statute, with all of which I entirely concur.

I am also of opinion that the contention that the Act of

1875 is superseded or displaced by the 40 Vic. ch. 42, is quite untenable. This Act was not intended to apply to fire and inland marine insurance. It is true that the definition of the word "company," as used in the Act, is very wide and comprehensive, but it is quite clear from the definition of policy holders that life insurance was the object to which the legislation was specially directed. That branch had intentionally been left untouched by the Act of 38 Vic., and the manifest object of the statute of 1877 was to subject life insurance companies to regulations similar to those which already governed fire and inland marine. In this way the Government scheme was completed by combining the two Acts. The 38 Vic. was left intact, except an unimportant sub-section, which is expressly repealed, and it is even provided that the Acts may be cited together as "The Insurance Acts of 1875 and 1877."

We are of opinion that the appeal must be dismissed, with costs.

Appeal dismissed.

RE THE ARBITRATION BETWEEN THE CREDIT VALLEY RAILWAY COMPANY AND THE GREAT WESTERN RAILWAY COMPANY.

Arbitration as to crossing under sec. 9, sub-sec. 15. R. S. O., ch. 165—Appeal therefrom—Motion to set aside award.

Arbitrators appointed under the Railway Act, R. S. O., ch. 165, to determine the compensation to be paid by the Credit Valley Railway to the Great Western Railway in respect of their power of crossing the latter railway under sub-sec. 15, of sec. 9 of the Act, made an award on the 31st of December, 1877. On the 19th of February, 1878, after Hilary Term had expired, the Great Western Railway obtained a rule *nisi* to set aside the award, and also took steps to appeal against it, under section 19 of R. S. O., 165, within the month after the award, by filing a bond for costs, and giving notice of intention to appeal.

Held, affirming the judgment of ARMOUR, J., that this was not a submission to arbitration within 9 & 10 Wm. III, ch. 15, or sec. 201, of the C. L. P. Act so as to enable the submission to be made a rule of Court; and that even if it were, the motion for the rule *nisi* should have been moved before the last day of Hilary term; and that the appeal therefrom was too late, as the giving security was not a commencement of the appeal within the meaning of sub-section 19, of sec. 20.

Semble, also, that the appeal given by that section is confined to arbitrations respecting lands and their valuation, and does not extend to an arbitration with regard to the intersection of railways.

THIS was an appeal from the judgment of Armour, J., discharging a rule *nisi* to set aside the award herein, and refer it back to the arbitrators.

Arbitrators having been appointed by Proudfoot, V.C., under the provisions of the Railway Act, R. S. O. ch. 165, to determine the compensation to be paid by the Credit Valley Railway Company to the Great Western Railway Company in respect of the exercise of their power of crossing the latter railway, under sub-section 15 of section 9, an award was made on the 31st day of December, 1877.

The Great Western being dissatisfied with this award, moved to set it aside, and obtained a rule *nisi* for that purpose on the 19th February, 1878, but not being satisfied that it was a case in which the award could be set aside on motion, they also took steps to appeal against it under the provisions of the above statute. Both motions were

heard before Mr. Justice Armour, who, on the 31st March, 1879, delivered judgment, discharging the rule, and dismissing the appeal, with costs.

The Great Western Railway Company appealed.

The case was argued on the 17th November, 1879 (*a*).

McMichael, Q. C., for the appellants. The arbitrators did not determine and award the amount of compensation to be paid by the Credit Valley Railway Company to the appellants in respect of the crossing or intersection by the Credit Valley Railway Company, as directed by the order appointing them, and as provided for by C. S. C. 66. Moreover, they improperly refused compensation to the appellants for the formation of the crossing upon an intersection of their railway and lands. Nor did the arbitrators allow compensation to the appellants for the powers proposed to be exercised by the respondents, for the use of their lands by the respondents' company, and for the damage and loss to the appellants by and in consequence of the proposed exercise of these powers, and of the proposed crossing and intersection and the use thereof. He cited *Great Western R. W. Co.* v. *Warner*, 19 Gr. 506; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418; *Beckett* v. *Midland R. W. Co.*, L. R. 3 C. P. 82, 95; *Conservators of the Thames* v. *Pimlico R. W. Co.*, L. R. 4 C. P. 59; *Eagle* v. *Charing Cross R. W. Co.*, L. R. 2 C. P. 638; *Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243.

Boyd, Q.C., for the respondents. The learned Judge was right in discharging the rule, as the Court had no jurisdiction to issue such a rule in an arbitration between railways as to a crossing. The reference being under the special power of an Act of Parliament, does not fall within the provisions of 9 & 10 Wm. III., ch. 15: *Widder* v. *Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 429; *Day's* C. L. P. Act, 215, 3rd ed.; *Re Harper*, L. R. 18 Eq. 539; *In re Harper and Great Western R. W. Co.*, L. R. 20

(*a*) *Present.*—Burton, Patterson, and Morrison, JJ.A., and Osler, J.

Eq. 42; *Rhodes and the Airedale Drainage Commissioners*, L. R. 1 C. P. D. 380. There is no power under the statutes relating to railways to make the award a rule of Court, and this is essential to the exercise of any summary jurisdiction by the Common Law Courts: *In re Ware*, 9 Ex. 401. But, in any event, the rule was granted too late, as the motion therefor was not made before the last day of the term next after the publication of the award. Nor was the appeal made within the month allowed by sec. 19 of R. S. O. ch. 165, upon which the respondents' right of appeal depends, since 38 the Vic. ch. 15 was repealed on the day when this award was made. It is true that notice was given on the last day of an intention to appeal; but to comply with the statute the appeal must be set down: *Grand Junction R. W. Co.* v. *Masson*, 44 U. C. R. 33. The reference is not so large or comprehensive as contended for by the appellants. The order of Proudfoot, V. C., of the 4th of December, 1877, defines the compensation to be in "respect of the forming of the crossing or intersection, and granting facilities therefor." The matters for which the appellants seek compensation do not fall within these words: *Cummins* v. *Credit Valley R. W. Co.*, 21 Gr. 162. The cases relied on by the appellants are not applicable to the intersection of railroads. In those cases the controversy was between the company and the adjoining proprietors of land. Here the crossing does not involve any right to take land, but is only an easement granted to the junior company: *Re Buffalo and Lake Huron and Great Western R. W. Co.*, 2 P. R. 93, affirmed in 14 U. C. R. 397; *Oxford, &c.* v. *South Staffordshire R. W. Co.*, 1 Drew 255. The arbitrators properly decided that under the reference no compensation was recoverable by the senior company for the stoppage of their trains. This is a statutory direction, and affects both companies. If the appellants are right in their contention, then the respondents would have a set-off for the stoppage of their trains by the Great Western Railway. Priority in franchise gives no right to tax a later railway for the right to cross the earlier track. This

matter has in effect been determined by the decision of the Railway Committee of the Privy Council: *Old Colony R. W. Co.* v. *County of Plymouth*, 14 Gray 153; *Brooklyn Central R. W. Co.* v. *Brooklyn City R. W. Co.*, 33 Barb. 420; *Re Central R. W. Co.*, 1 N. Y., S. C. 419; *New York and Harlem R. W. Co.* v. *42nd Street R. W. Co.*, 50 Barb. 314; *Newbury R. W. Co.* v. *Eastern R. W. Co.*, 23 Pick, 326; *Grand Junction R. W. Co.* v. *County of Middlesex*, 14 Gray 559, 610; *Caledonian Co.* v. *Ogilvy*, 2 Macq. 229; *Wood* v. *Stourbridge*, 16 C. B. N. S. 222. The further compensation claimed by the appellants arises from the contemplated working of the railway, and not by reason of its intersection and granting facilities therefor: *Hammersmith R. W. Co.* v. *Brand*, L. R. 4 H. L. 171; *Great Northern R. W. Co.* v. *East, &c., R. W. Co.*, 7 Railway Cases 356; *Clarence R. W. Co.* v. *Great North, &c, R. W. Co., England*, 2 Railway Cases, 763.

McMichael, Q.C., in reply. The Judge in the Court below held that the motion was not too late, and this Court cannot take the objection. Notice of intention to appeal was not only given, but a bond for security for costs was lodged, which was a sufficient commencement of the appeal under section . (Osler, J., referred to *Hunter* v. *Griffiths*, 7 P. R. 86, as shewing that something more was necessary.)

January 15, 1880. BURTON, J.A.—Mr. Boyd, for the respondents, took the preliminary objection, that whatever might have been the effect of the 38 Vic. ch. 15, that statute was repealed by ch. 6 of the Revised Statutes which came into effect on the day this award was made.

The right of appeal therefore must depend upon the interpretation to be given to sub-sections 19 and 20 of section 20, of ch. 165 of the Revised Statutes.

The Great Western Railway Company being a Dominion work, and as such within the jurisdiction of the Parliament of Canada, it became necessary to obtain the approval of the Railway Committee of the Privy Council, who, under the Railway Act of 1868, were substituted for the Board

of Railway Commissioners, whose approval of the mode of crossing, union, or intersection proposed, was requisite before any railway company could avail itself of the powers claimed to be exercised under sub-section 15 of section 9 of the General Railway Act of the late Province of Canada. The general provisions of that Act, from section 127 to the end, apply to the Great Western Railway, and provide that on such approval being obtained, either railway, in case of disagreement upon the amount of compensation to be made therefor, or upon the point or manner of such crossing and connection, may cause the same to be determined by arbitrators to be appointed by a Judge of one of the Superior Courts.

The Credit Valley Railway, on the other hand, is not subject to the jurisdiction of the Dominion Parliament, but is subject to the provisions of the Act respecting railways of the Province of Ontario, which contains enactments on this subject almost identical in terms, except that the approval of the Commissioner of Public Works is required in lieu of the Railway Committee of the Privy Council.

The Act of 1868 does not, with the exception I have referred to above, apply to the Great Western Railway, and it may well be that when the Provincial Legislature assumed to legislate in reference to arbitrations under the Railway Act and the Act of 1868, they intended to confine themselves to arbitrations respecting land taken or injuriously affected by the construction of the railway, and not to those connected with the exercise of the powers of the company in its working or construction, such as the present, with which in the case of those railways subject exclusively to the legislative authority of the Parliament of Canada, the Local Legislature would have no power probably to deal; and this may have been the view of the commissioners in consolidating the statutes.

The clauses of the 38 Vic., as consolidated, are to be found with the group of sections under the heading "Lands and their Valuation," and would appear to be confined to arbitrations between the company and the owners of lands taken or injuriously affected by the construction of the railway,

But assuming that these sections have a wider application, and can be held to extend to arbitrations of this kind, it is further urged that the appeal was not made within the time limited by the statute. The 19th section enables a party to the arbitration to appeal within one month after notice of the award. The 20th section enacts that upon any such appeal the practice and proceedings shall be the same as upon an appeal from the decision of a Judge of the County Court under the County Courts' Act.

It was contended by the counsel for the appellants (although that fact does not appear upon the appeal books) that security was given within the month to prosecute the appeal, and that that would be a commencement of the proceeding to appeal within the meaning of the Act. To my mind such a proceeding was wholly unnecessary, and cannot be regarded as a compliance with the Act. In the County Court security has to be given in such sum as the Judge of the Court appealed from may direct, to abide by the decision of the Court appealed to. Here there was no Court appealed from, and consequently no Judge to make such direction, or to approve the security. The practice and proceedings referred to bear so little analogy to the proceedings to be taken in an appeal of this nature, that one is surprised at finding a reference to them in the Act. The County Court Judge, in an appeal from his Court, is required to certify the pleadings in the cause, and all motions, rules, or orders made, granted or refused therein, together with his charge and the judgment or decision on the same, and where a trial has been had, the evidence and all objections and exceptions thereto, and all other papers in the cause affecting the questions raised by the appeal. It is manifest that no such requirement can be made on such an appeal as the present, and there is no officer who can be called upon to perform the duty. The arbitrators, on making their award, are *functi officio*, and could not be compelled to make any certificate; but in truth the Act, by the 12th sub-section of section 20, has already provided that the evidence, together with the exhibits and all other papers

connected with the reference, except the award, shall be transmitted by the arbitrators to the clerk of records and writs of the Court of Chancery, and there filed, with a view to an appeal. Sub-section 20 therefore, except in so far as it authorizes the Judges to make rules upon the subject, would seem to be misleading and unnecessary. The notice of intention to appeal does not satisfy the requirements of the statute, and as the case was not actually set down to be heard till long after the expiration of the thirty days, I think it was properly dismissed.

Then as to the rule to set aside the award, it is objected that the Court had no jurisdiction to issue such a rule in a reference of this nature, there being no power, it is contended, under the statutes to make the reference a rule of Court, which is necessary to the exercise of any summary jurisdiction by the Common Law Courts.

It is clear that the jurisdiction, if it exists, is simply by reason of the submission being made a rule of court. The appointment made by the learned Vice-Chancellor has been made a rule of the Queen's Bench, and the question arises, is this a submission within the statute so as to warrant such a course being taken?

It appears to me that it cannot be regarded as a submission in any sense of the word. In the case referred to on the argument, and which has gone much farther than any previous case (*Rhodes and the Airedale Drainage Commissioners*, L. R. 1 C. P. D. 402), the facts and the enactments relied on, were materially different.

The power to make this document a rule of Court, if it exists, is derived from the 201st section of the Common Law Procedure Act, which provides that every agreement or submission to arbitration by consent, whether by deed or writing not under seal, may be made a rule of Court unless it contains words purporting that the parties intended it should not be made a rule of Court.

In the case just referred to, the arbitration was under the Lands Clauses Consolidation Act of 1845, section 25 of which expressly declares that the appointment of an

arbitrator by each party respectively shall be deemed a submission to arbitration on the part of the party by whom the same shall be made.

In that case the claimant and the commissioners had each appointed an arbitrator, instead of the commissioners having exposed themselves to the appointment by the claimant singly; and the 25th section having declared that such an appointment should be deemed a submission, the arbitration was, by the effect of that section, an arbitration by consent within the terms of the Common Law Procedure Act. Here the reference was not only compulsory, but the selection of arbitrators was left entirely to the party designated by the statute, the party so designated being in this case a Judge of the Superior Court; but this circumstance cannot, in the slightest degree, affect the question of this being a document which can, under the statute, be made a rule of Court. I think this was not a reference by consent so as to warrant the document being made a rule of Court, and if it had been, I think the delay in moving a fatal objection to which we are bound to give effect, the right to move being given by statute which allows the motion to be made if so made within the time prescribed. As remarked by Cockburn, C. J., in the case of *College of Christ* v. *Martin*, L. R. 3 Q. B. Div. 16, we have power to make rules, but we have not the power to alter an Act of Parliament.

As we are compelled to give effect to the objections both as to the appeal and the rule to set aside the award, it does not become necessary to consider the objections to the award itself. The appeal in each case should be dismissed with costs.

Osler, J.—As regards that branch of the appeal which relates to the judgment of Mr. Justice Armour on the rule *nisi*, I am clearly of opinion that the appellants must fail. Conceding that the reference was one within the Statute 9 & 10 Wm. III. ch. 15, or the 201st section of the Common Law Procedure Act, R. S. O. ch. 50, the motion should

have been made according to the established and inflexible practice before the last day of the Term next after the publication of the award.

The award was published before Hilary Term, and the rule *nisi* was not moved for until after that term had expired. The objection was taken on the argument before the learned Judge, as we have ascertained from him, and though not made one of the reasons against the appeal in the printed case, was urged on the argument before us, and we are bound to give effect to it: *Re North British R. W. Co.* v. *Trowbridge*, L. R. 1 C. P, 401; *Re Moyle and The City of Kingston*, 43 U. C. R. 307; *Wilson* v. *Richardson, Ib.* 365; *Re College of Christ* v. *Martin*, L. R. 3 Q. B. Div. 16.

I am, however, also of opinion that the appointment of arbitrators made by Proudfoot, V. C. was not a submission to arbitration within either of the statutes above mentioned, and was therefore incapable of being made a rule of Court, an indispensable preliminary to any motion to set aside or enforce the award.

In England it has been held under the compensation clauses of the Lands Clauses Consolidation Act, where both parties have appointed an arbitrator, that the appointment being by section 25 a submission to arbitration on the part of the party by whom it is made, the arbitration is an arbitration by consent within the Common Law Procedure Act. The language of our Railway Acts is very different: *Rhodes and the Airedale Drainage Commissioners*, L. R. 1 C. P. D. 380, 402.

As to the other branch of the appeal. This Court has appellate jurisdiction from a judgment upon any appeal authorized by law from the decision of any arbitrator or referee.

The appeal which was heard by Mr. Justice Armour, was brought, to put the matter in the most favourable way for the appellants, on the 30th January, 1878. The award was made on the 31st December, 1877, on which day the Revised Statutes of Ontario became law. Under the Act

respecting Railway Arbitrations, 38 Vic. ch. 15, sec. 4, a right of appeal was given to "any party to an arbitration under the Railway Act of 1868," and had this Act remained in force it might perhaps have been successfully contended that an appeal would lie from such an award as that in question here. But in the Revised Statutes the several sections of the Act referred to find their place in sec. 20, ch. 165, under the heading "Lands and their valuation," and the right of appeal is plainly limited to the case of awards in respect of compensation for lands taken from private persons. The appeal then, not having been brought before the Revised Statutes became law, was not saved under sec. 9 of 40 Vic. ch. 6.

In my opinion, therefore, there was no appeal authorized by law from this award, and this Court has no jurisdiction to entertain the present appeal from Mr. Justice Armour's judgment.

As I think the appeal must be dismissed for the foregoing reasons, it is unnecessary to express an opinion upon any of the other points argued.

PATTERSON, J.A.—I concur in the dismissal of this appeal on the grounds stated by my brother Osler, the motion against the award having been too late, even if the matter could properly have been made the subject of review.

MORRISON, J.A., concurred.

Appeal dismissed.

RICE V. BRYANT.

Insolvent Act of 1875—Fraudulent mortgage—Evidence—Burden of proof.

The insolvent, on the 17th September, 1877, gave a mortgage to the defendant, the alleged consideration being a prior debt of $600 and an advance in cash of $1800. On the 18th October the writ of attachment issued. It was not pretended that any money was paid before the 1st October.

Held, that the onus of supporting the transaction was upon the defendant; and, reversing the decree of PROUDFOOT, V.C., that the evidence, which is fully set out below, was wholly insufficient, and, on a bill filed by the assignee in insolvency, the mortgage was set aside.

THIS was an appeal from a decree of Proudfoot, V. C.,* dismissing a bill filed by the plaintiff, the assignee in insolvency of Joseph D. Foley, impeaching, as a fraud upon the creditors, a mortgage given by the insolvent to the defendant.

The facts are fully stated in the judgment below.

Boyd, Q. C., and *J. H. McDonald*, for the appellants (*a*). The evidence adduced at the hearing established that no money was advanced or loaned by the defendant to Foley

* The following is the judgment of PROUDFOOT, V. C.:

"My impression is, that the onus lies on the defendant in this case. I do not think that the transaction can be considered as a completed transaction until the money was paid. It is true that Bryant, the defendant, had $1,600 of this money in his pocket ready to hand over at the time the mortgage was executed, which the mortgagor would not take, giving as his reason that there was $200 wanting, and it is not until the 1st of October that the mortgage really becomes a security, because it was not until then that the money was paid. The only question is, whether the defendant has answered the requisition of the statute, and has shewn that this transaction was one for good consideration, and made in good faith. Notwithstanding the discrepancies which have been pointed out and properly commented upon, my conclusion, on all the evidence, is, that the transaction ought to stand. There is no reason whatever alleged for the supposed combination between Bryant and Foley; there is no relationship shewn to exist between them; no transaction in which they were jointly interested; no profit shewn to accrue to Bryant from the arrangement more than the interest upon his mortgage; so that it is difficult to understand what causes could have moved Bryant to participate in a fraud from which he could derive no benefit and might derive the loss of $1,800.

(*a*) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

as the consideration for the mortgage in question. The fair and reasonable inference is that the mortgage was executed

Then the arrangement that Foley was proposing to make for obtaining the loan of money seems to have been a reasonable one, and one that is carried out every day. We find that our municipal bodies are consolidating their debts. He wanted to consolidate his debts; he wanted to have all those debts which were due to his creditors represented by the mortgage in Bryant's hands, so as to carry on his business on a cash basis. That is a reasonable enough arrangement, one that we may expect to be carried out even when a man is solvent. He applies to Bryant then for the loan of the money. There is no evidence shewing that Foley knew that he was insolvent; knew he was in greater difficulties than any man is who is desirous to pay. It is not shewn that his debts overbalanced his assets in any way, or that he was in difficulties, or that his position was anything more than his having debts which he was desirous of paying off and entering on the business in a new mode of carrying it on. Then the question is, whether this money was really paid or not; and I think the evidence ought to lead me to the conclusion that it was paid. Both Bryant and Foley swear to the payment of the money, and I do not think that a mere charge of fraud is sufficient; you must do something more than charge fraud; you must give evidence tending to the conclusion that there was not a *bona fide* transaction, and that the money was not really paid. However, these two men both swear this; and although the defendant did not give his evidence in such a satisfactory way as we would have liked, I do not think he wanted to give his evidence falsely. Foley gives his evidence in a more satisfactory way; but both of them swear—the one to the payment and the other to the receipt of the money. And that evidence is corroborated, it seems to me, by that of these two servants. There is evidence that Foley, on his return from Oshawa, at that time, had a large sum of money; and it is not contended that there was any other source from which it could be got other than from this man Bryant. It is shewn that he was counting this money, and that while he was counting it he counted $1,800. The mention of this sum there is not mere hearsay evidence, but really part of the *res gestæ*. That is also strengthened by the evidence of the man Levi Langton. He also saw a large roll of bills in Foley's possession on that day, which he was counting. There is, of course, these discrepancies and these improbabilities that strike one a little, but I do not think they are things that are impossible to be got over. Bryant is a man engaged in dealing in cattle, and is in the habit of carrying large sums of money about him for the purpose of his business. At this time he takes money to Oshawa, with the expectation of meeting the other man, and he does meet him and pays him in the street, and does not take a receipt. It would have been more satisfactory if he had taken a receipt; more satisfactory if he had paid a cheque on his own bank; or that a couple of witnesses were brought in to prove the transaction, and to shew that it was not a mere fiction.

I do not know if it is of any importance to shew, as far as the results of this case are concerned, what became of the money afterwards But the story of Foley is not an improbable one. It is not an impossible one that he had that money; went for the purpose of liquidating his debts; and that he was robbed of it. At all events the money did not reach the

for the purpose of hindering and delaying the insolvent's creditors. It was held by the learned Judge that the onus rested on the defendant to prove that the transaction was one for good consideration and made in good faith, and the evidence was not of that clear and satisfactory nature necessary to that purpose.

Mowat, Q.C., and *G. Y. Smith*, contra. It clearly appears from the evidence that the mortgage was given for value and *bona fide:* that the consideration was a contemporaneous advance of $1,800 to Foley by the defendant, and a further sum of $600, previously due by him to the defendant. The learned Judge who heard the cause believed the defendant and his witnesses, and inasmuch as the question depends on the credibility of these witnesses and there is no evidence against theirs, the decision of the learned Judge should not be interfered with in appeal.

Moss, C. J. A.—The mortgage bears date of the 17th of September, 1877, and was registered on the 20th day of that month. The writ of attachment was issued on the 18th of October following. The expressed consideration in the mortgage is $2,400, which is alleged to be composed of a previous debt of $600 due to the defendant, and an advance in cash of $1,800. As it is not pretended that any money was paid at the time of the execution of the mortgage, or

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creditors. But I do not think that that need prevent the mortgagee from recovering or retaining his security for the advance of the money.

As to these discrepancies as to dates, sums, and order of dates, they are just things that occur every day, in which it is almost impossible for any one of us to tell the regular sequence in which events have occurred. I know that I should find it impossible to tell the sequence of events, unless they were greatly impressed on my mind, that took place a year ago. I do not think that very many of the counsel engaged could venture to do so either. The advance of the money, however, is a question that would be readily impressed on the mind, and the fact of the receipt of money from different sources, or as to whether one preceded the other, might be a question of doubt. As to the payment of the money to the woman, that seems to be explained by the evidence taken before the assignee, that it was not paid out of this money got from Bryant, but out of the money got from the bank.

I think, upon the whole, that the bill fails, and should be dismissed.

before the 1st of October, and as insolvency supervened with such rapidity, we entirely agree with the opinion to which the learned Vice-Chancellor inclined at the commencement of his judgment, that the burden of supporting the transaction is cast upon the defendant. As the Vice-Chancellor has also pointed out, the principal question undoubtedly is, whether the sum of $1,800 was actually and *bona fide* advanced by the defendant; but it is also important to examine the evidence touching the $600. upon which the plaintiff has endeavoured to cast suspicion. The onus being upon the defendant, it was incumbent for him to establish in a reasonably clear and satisfactory manner the existence of the previous debt, and the making of the advance. There is no presumption in his favour, but he must be able to produce affirmative evidence of his contention. We propose then to examine the testimony before the Court with the view of determining whether he has satisfied this condition. In following this enquiry we are bound to keep constantly present to our minds the great advantage which the learned Judge enjoyed in having the opportunity of observing the demeanour of the witnesses. But it may be observed that from the report of his judgment there is reason to doubt whether his impression of their manner was very favourable, or whether he was free from suspicion as to their entire reliability. He observes, that although the defendant did not give his evidence in such a satisfactory way as he would have liked, he did not think he wanted to give it falsely. As to Foley, he remarks that he gave his evidence in a more satisfactory way. In weighing the evidence we have endeavoured to give the defendant the full benefit of these impressions of the Judge of first instance.

In the mere outlines of this transaction there are some features that immediately arrest attention, and strike the mind as being highly peculiar. The defendant has been for some time a cattle-dealer, and there is no special reason for supposing that the pursuit of that business tends to dull native wit or sharpness. Yet upon the land com-

prised in the mortgage, which must be taken upon the evidence of Foley himself to be worth not more than $4,000, and which was subject to a prior mortgage of $1,600 principal, he accepted a second mortgage for $2,400, of which $1,800 he asserts was advanced in cash, This mortgage bears interest at 7 per cent. only, while his own property was mortgaged for $1,900 at 8 per cent., and $600 of this is overdue. This somewhat hazardous investment he made at the request of a man whom he declares to have been not even an intimate friend, although it is true that in the first of the various examinations which he has undergone in relation to this matter, he is reported to have sworn that he knew him intimately. This risk he ran without making any special examination of the property for the purpose of forming an opinion of its value, although some $700 of this value is said to have consisted in a barn, which seems to have been built after his last visit. Indeed, he had only been over the property twice, and then casually, without any intention of lending money upon its security. So implicitly did he trust in this person, who was not an intimate friend, and of whose integrity he had no personal experience, that he made no search as to the title, but relied upon his debtor's assurance that it was all right. Except from this assurance he did not even know the amount of the prior mortgage. According to his own statement he was obliged to borrow a considerable portion of the money which he invested in this reckless fashion. According to the statement of both parties, he paid this large sum without any witness being present, without taking any receipt, or without then obtaining possession of the mortgage deed, in simple reliance upon the mortgagor's statement that it had been registered. Indeed at that time I doubt if he had any evidence that the mortgage had been executed except the bare word of the mortgagor.

It is true that the insolvent had shewn a similar spirit of confidence in his integrity, for he had registered the mortgage ten or eleven days previously, in reliance that the

money would be forthcoming in due season. The whole of this course of conduct seems very extraordinary between two persons, one of whom was a cattle-dealer, and the other a peddler, and who were not, as we were more than once reminded, on terms of special intimacy. The Vice-Chancellor appreciated the necessity of some satisfactory explanation being furnished of this unusual method of transacting business, for he referred to the improbabilities surrounding the defence. But it seems to us that he would have deemed the attempt at explanation wholly unsatisfactory, if he had not to some extent qualified his original opinion that the onus was on the defendant. He observed, in this connection: "Both Bryant and Foley have sworn to the payment of the money; and I do not think that a mere charge of fraud is sufficient. You must do something more than charge fraud. You must give evidence tending to the conclusion that there was not a *bona fide* transaction, and that the money was not really paid." In this method of treating the case we are unable to concur. It manifestly neutralizes the correct and sound principle that the onus was upon the defendant. In truth the question of fraud was subsidiary and incidental. The cardinal point was, as the Vice-Chancellor had plainly pointed out, whether there was a real consideration.

When the evidence is analyzed, the difficulties in the way of answering this enquiry favourably to the defendant are immensely increased.

The plaintiff attacks the transaction in all its steps. He contends that there is no satisfactory proof that the debt of $600 existed, or that the defendant was possessed of the sum of $1,800, or that he paid that sum to Foley.

The principal witnesses were the defendant and Foley themselves. The former was examined on three occasions: firstly, on the 10th of November, before the assignee; secondly, on the 9th of February following, upon his answer; and, lastly, on the 7th of May, at the trial. Foley also gave evidence at the trial, having previously been examined in the insolvency proceedings on the 6th of

November. It will be observed that the examinations in insolvency took place while the transaction was still quite fresh. It is made matter of observation that the assignee had been newly appointed, and was not a professional man, but the depositions seem to have been recorded with precision, and the defendant was not without the assistance of counsel, who, presumably, heard them read over before they were signed. The cross-examination upon the answer was before a most accurate and experienced officer of the Court of Chancery. The examination in open Court is recorded by the official reporter, in the form of question and answer, so that a faithful transcript is before us. Now as to the existing debt of $600, although it is perhaps less dubious than the money payment, the proof is far from satisfactory. It is said to have been evidenced by two promissory notes, for $150 and $450; the first given in August, 1875, upon a horse trade, payable in one year, and the other given in June, 1876, for money lent. Neither of these notes is produced. As to the $450 note, one statement of the defendant is, that it was payable on demand, another that it was payable a year after date. It is said to have borne interest at eight per cent. The defendant says nothing was ever paid upon either of the notes—an assertion which naturally starts the inquiry why the mortgage was taken for $2,400 only, without including interest. Foley swears that he gave him a colt for the interest. He also said, in his examination before the assignee, that he got the $150 note in June, 1866, meaning 1876. Afterwards he said he did not receive either of the notes until he gave the mortgage; and almost in the same breath, that he could not tell when he got the $150 note; that he had forgotten about it. In another place he said: "I took up the $150 note." At the trial he made this curious statement with reference to it: "I never saw it *since it was paid.*" He also swore that he had one of them (the $450 note) in his possession, and he had looked for the other, but it was lost. According to him, when the defendant paid the money he asked for the notes, but the defendant hadn't them with

him. The defendant's version is, that he had the notes, but that he didn't choose to return them until he received the mortgage.

When we consider the statements of the defendant with respect to his possession of such a sum of $1,800, the contradictions and discrepancies are so striking that we cannot find in his favour. The account that he gave upon his first examination in *November* of the manner in which the money had been gathered together is admitted by himself to be incorrect, and there is no satisfactory explanation of this circumstance. It must be remembered that this examination was held soon after the transaction, and that he is a man who is accustomed in all his transactions to rely upon his memory, rather than upon written accounts. All experience of such persons shews that their memory becomes singularly faithful and retentive in money deal-dealings. A memory thus trained and sharpened by self-interest can recall the uttermost farthing. It would not surprise me to be told that the defendant could name the precise sum he had paid for each of the cattle he had bought during the previous quarter. It is very surprising that in this, which appears to have been the only large loan he ever made in his life, he was utterly at fault as to the sources from which the money was derived. It certainly gives some point to the plaintiff's explanation of the new version, which is, that he had the persons in Court from whom this money had been said to have been received, prepared to give a flat contradiction to the defendant. Neglecting some minor discrepancies, we may note that upon his first examination he said he got $700 from his son Willliam Thomas, about the 10th or 12th of September, and $600 or $700 from Mr. Christian, some money—he could not state what—from Yeoman Gibson, and that at the time Foley applied to him for the money, about the end of August or beginning of September, he had $600 or $700 of his own.

Upon that examination he said nothing about having received any money from his son-in-law, Henry Clay, or

his son Joseph. He was then asserting that he had nearly all the money on the 17th of September, the day the mortgage was executed, but that it was not delivered because he had not the full sum of $1,800. Indeed he seems throughout to have been desirous of maintaining the story that he had $1,600 on the 17th of September. But when he is cross-examined before the Master his account is materially different, and fails to show that he was in possession of $1,600 on the 17th of September. He says he got $600 or $700 from Mr. Christian, but this was on the 29th of September, and it afterwards was proved by that gentleman that the sum was $611, of which only $211 was paid on the 29th September, when a due bill was given for the balance, which was not paid until the 10th of October. He proceeded to say that he got $700 from his son a few days before—about a week, not a fortnight before. He got $300, he says, from Clay, whose name he had not mentioned on the previous occasion, but this was a week or so before the 1st of October, and after that he got money from Gibson. He had some of his own, about $300—not $600 or $700, as he had previously stated. He added that he received no other large sum in September. No farther observation is needed to point out that this is wholly inconsistent with his having in his possession $1,600 on the 17th September. At the hearing he gave a third version. This is, that on the 15th of September he borrowed $700 from his son William Thomas, which he said he had asked him for, in "the fore part of September, I think."

Next he said he got $200 on the 16th of September, from his son Joseph, whose name he then introduced for the first time. Neither of these sons was called to confirm their father's statements. He makes up the balance of the $1,600 by alleging that he got $300 from Clay about the 15th September, and that he had about $400 himself. He admitted that he had not received from Gibson any of the money alleged to be paid upon the mortgage, and that he did not get it until after the 17th of September, although he had positively sworn before the Master

that he received it before he got the money from his son. Again, he says in one passage that when he spoke to his son about the money he was to lend he told him that he should want it before the 1st of October, that being the time when Foley needed it, and yet there is no pretence that that date was mentioned before the 17th of September, when he had already received the money from his son. In the presence of such a mass of discrepancies and with versions which are painfully suggestive of alterations constructed to meet exigencies, it seems impossible to hold that the defendant has shewn with reasonable certainty that he had the money he professes to have advanced. Nothing can be more specific than his assertion that he had it on the 17th September. He ventures upon the detailed statement that he brought it home with him then, and locked it in a drawer, where it remained until 1st October, with the exception of $200 or $300 which he took out. Nothing can be more certain than that taking his statements in the aggregate they are utterly inconsistent with this being true.

It is still more difficult to accept as satisfactory the attempt at proof that any such sum was paid by the defendant. The defendant says that Foley applied to him in the beginning of September for $2,000, and that after a week or two of consideration he agreed to advance $1,800. Foley says he never applied for more than $1,800. Then the story, as narrated at the hearing, proceeds thus: When the defendant agreed to advance the $1,800, they both went to the office of a solicitor to have the mortgage drawn, but nothing was then done because Foley had come without his deed, an inspection of which was necessary for the description in the mortgage. The defendant does not seem to have taken any money with him at that time, and the parties separated without any appointment for another meeting, but upon the understanding that Foley was to mail the deed to the solicitor in order that the mortgage might be prepared. On the 17th of September there was a political pic-nic, which the defendant attended

with $1,600 in his pocket, for the reason that if he saw Foley there and he wanted this money he could give it to him. They did meet there, but quite accidentally. The improbability of this is too glaring to need comment. However, the mortgage was executed on that day, but the money was not paid, because Foley would not deliver the mortgage until he got the full sum of $1,800. They then separated without any appointment as to the time or place of meeting, except that Foley said he wanted money by the 1st of October, and the defendant said he could have it about that time.

Singularly enough, although Foley was not willing to deliver the mortgage in reliance upon a promise of the defendant to pay the deficiency of $200, he had sufficient faith in his undertaking to be ready with the whole sum about the 1st of October, that on the 20th September he registered the instrument. On the 1st of October, although there was no appointment to meet on that day, the defendant set out for Foley's place of residence carrying with him $1,800.

It is perhaps scarcely worth while to pause for the observation, that when first examined he said that if he did not see Foley before that date he was to take the money to his house, or that Foley said that he calculated to take the mortgage himself to the defendant's house; that defendant told him that almost at any time he would have the money. However, Foley by a curious coincidence started on the 1st of October to go to defendant's house, but still more curiously he neglected to take with him the mortgage. The defendant lives about eleven miles north of Whitby, and Foley six or seven miles east of that town. The defendant passed through Whitby, and after a brief delay arrived at Oshawa about three or four o'clock in the afternoon. There he saw Foley walking upon the street, and he called out to him the pleasant tidings that he had the money. There and then on the street he paid him the money in three sums of $900, $700, and $200. There is a conflict of statement whether the $200 was counted,

but both agree that there was no counting over of the other two parcels. Foley wished the defendant to go home with him and get the mortgage, but defendant, although he had come so far, and although he had no reason to anticipate such a piece of good fortune as meeting his mortgagor in Oshawa, said that he had not time, as he wanted to go to Whitby. He took no receipt for the money, as Foley told him that the mortgage was receipt enough, and that it was registered. His mistrust of Foley went no further than the refusal to give up the two promissory notes. Although he would not spare time to go to Foley's house, he idled away half an hour upon his return at Whitby, an interval which would have been sufficient to have enabled him to finish the transaction.

The strangeness of this story seems to culminate in Foley's account of the fate of the money. He says that he left Oshawa that same evening by the train for the purpose of paying this money to his creditors, but that he fell asleep in the smoking car and was robbed. He did not discover his loss until he had reached his hotel, and was retiring to rest. He lay awake all night, but did not then inform the landlord, nor did he afterwards communicate with the police or adopt any measures for the recovery of the money, the reason he assigns being that he feared his creditors might proceed against him. It is scarcely necessary to say that if the advance had been sufficiently proved, the mortgagee's security would not have depended upon the truth or falsity of this story.

We think that it would be contrary to public policy to hold that such a transaction, entered into upon the eve of insolvency, can be supported upon such evidence, even if the demeanour of the witnesses does produce a favourable impression upon the Judge. It is sufficient to say to the defendant, that however unfortunate it may be for him, if he has really advanced his money, he has not produced satisfactory evidence of the fact, which the law requires him to prove. If he has none but the statements of himself and the person with whom he deals, it is not meting

out to him any hard measure to require that his story shall be both probable and self-consistent.

The rule acted upon by the Court in *Merchants' Bank* v. *Clarke*, 18 Gr. 594, and similar cases, seems to be a wholesome one, founded upon principles of general utility, and when discreetly applied not likely to be productive of individual injustice. Certainly less strictness should not be observed in a case where the defendant, instead of being entitled to the full benefit of the presumption in favour of innocence, is called upon to sustain a transaction which is *prima facie* obnoxious to a charge of fraud upon the insolvency law.

It is proper to observe that the learned Vice-Chancellor laid some stress upon the evidence of two servants of Foley, who proved that on the night of the 1st of October they saw him counting over a large pile of money. They did not count it themselves, and did not know its amount, but he remarked it was $1,800. Even assuming this remark to be admissible in evidence, it does not seem to us to be of any value. It would manifestly be an easy way of manufacturing evidence. For all that these persons could tell there might not have been $100 on the table.

The appeal must be allowed, with costs, and a decree made in accordance with the prayer of the bill, with costs.

Appeal allowed.

DONLY v. HOLMWOOD.

Joint stock company—Assignment in insolvency—Headings of statutes.

Held, affirming the judgment of the Common Pleas, 30 C. P. 240, that the directors of a joint stock company incorporated under the Canada Joint Stock Companies Letters Patent Act, 1869, 32 & 33 Vic. c. 13, D., and subject to the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency.
The headings of a statute may be referred to, to assist in the construction of ambiguous provisions.

THIS was an appeal from a judgment of the Court of Common Pleas, discharging a rule *nisi* to set aside the verdict and enter it for the plaintiff, reported 30 C. P. 240. The pleadings and facts are fully stated there.

The case was argued on the 15th January, 1880 (*a*).

McCarthy, Q.C., for the appellant. The board of directors had authority to resolve upon and authorize the execution of a deed of assignment, under the provisions of the Insolvent Act. The power of the board is to manage and administer the affairs of the company: secs. 16 and 22 of Joint Stock Companies Letters Patent Act, 1869, 32-33 Vic. ch. 13, D. This power, when not, as it is not, restricted (see Green's *Brice's Ultra Vires*, pp. 411, 412), includes the power to arrange and compound with creditors, to give them security, if necessary, on the property of the Company; and, it is submitted, if it authorize the Board to assign or mortgage the property to secure one particular creditor a portion, there must be the power to assign under the Insolvent Act for the benefit of all: *Sargeant* v. *Webster*, 13 Tret. 497; *Dana* v. *Bank of the United States*, 5 W. & S. 247; Field on Corporations, secs. 146, 152; *Hoyt* v. *Thompson's Executors*, 19 N.Y. 207. Express authority to assign under the Insolvent Act is not, is is true, conferred by the Joint Stock Companies Letters Patent Act referred to; but it is submitted that in trading corporations the general power to administer the affairs of the Company must necessarily confer the

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Present.—MOSS, C. J. A., HAGARTY, C. J. Q. B., PATTERSON, and MORRISON, J J. A.

authority to make all arrangements for the payment or security of creditors and the general words conferring powers of this kind are liberally construed: *Wilson* v. *Miers*, 10 C. B. N. S. 348; *Bank of Switzerland* v. *Bank of Turkey*, 5 L. T. N. S. 549. The Company is not, as is laid down in the judgment of the Court below, wound up by assigning under the Insolvent Act for the benefit of creditors; on the contrary, the Company's corporate existence is not affected by the assingnment, nor are the affairs of the Company necessarily wound up. The embarrassment of the Company may be but temporary, and it may again resume business, paying all its creditors in full, or it may agree on a composition and discharge, as all the general provisions of the Insolvent Act apply as well to corporations as to individuals. Or without compounding, it may be discharged, and again resume business either on borrowed capital (see secs. 60, 61) or by calling up stock, if it be not all paid up. The true line as to where the authority of the board of directors ceases, is to be drawn between any act partaking of the character of an arrangement with the creditors of the company, and an act which would dissolve the company or cause its dissolution. The directors have no power to part with the franchise or to dissolve the company, but an assignment under the Insolvent Act does not *per se* dissolve a trading corporation; this is all that is decided in *Featherstonhaugh* v. *Lee Moor, &c. Co.*, L. R. 1 Eq. 318. It is submitted that it is an error to hold that the business of a company on its assigning may be carried on by its assignee. He has no such power under the Insolvent Act, his authority being to realize the assets of the insolvent estate. The provisions of the Insolvent Act are made by sec. 147 to apply to incorporated companies except when specially excepted. The modifications of the Act are as to compulsory proceedings only, and do not affect voluntary assignments, *i.e.*, assignments made on demand without the intervention of the Insolvent Court or Judge. While, therefore, these provisions do not assist the contention of the appellant, neither do they affect the case in any way.

James Magee, for the respondent. An assignment under the Insolvent Act of 1875, without the consent of the shareholders, is beyond the powers conferred by the Canada Joint Stock Companies Letters Patent Act, 1869, upon the directors; and such an unauthorized assignment is not a management or administration of the company's affairs, but a permanent transfer or abandonment by the directors of their managing powers, and is wholly different from a mere sale of specific assets or an arrangement or composition with creditors, and is practically a dissolution of the company. Secs. 16, 38, 39 of Insolvent Act of 1875; *Stanley's* Case, 33 L. J. Chy. 535; *Lindley* on Partnership, 3rd ed., 312; *Ernest* v. *Nicholls*, 6 H. L. C. 401; *Bump* on Bankruptcy, 7th ed., 3, 664; *Ansonia Brass & Copper Co.* v. *New Lamp Chimney Co.*, 64 Barb. 435,53 N. Y. 123; *State Savings Association* v. *Kellogg*, 52 Mo. 583. Sec. 147, sub-sec. 15, of Insolvent Act of 1875 requires that the directors be "duly authorized" before making an assignment under the Act. There was no authority for calling meetings of the shareholders or directors at Simcoe, that not being the chief place of business named in the charter, nor even a place at which the company's operations were thereby authorized to be carried on; and even assuming that a meeting there were legal if all entitled to attend did attend, yet the resolution to make the assignment in insolvency was invalid, as one director was not present; and upon similar grounds the meetings of shareholders in 1877 and 1878, at which directors were elected, were void, and the directors not duly elected, and any calls by them would be invalid. 32–33 Vic. ch. 13, secs. 4, 5, 7, 32, 35, 38, D.; *Howbeach Coal Co.* v. *Teague*, 5 H. & N. 151; *Iron Ship Coating Co.* v. *Blunt*, L. R. 3 C. P. 488; *Lindley* on Partnership, 3rd ed., 258, 569, 645, 650; *Angell & Ames* on Corporations, sec. 491 (note), 495, 496; *Smyth* v. *Darley*, 2 H. L. C. 789; *Bosanquet* v. *Shortridge*, 4 Ex. 699; *Kirk* v. *Bell*, 16 Q. B. 298. If the assignment in insolvency were valid, the company's secretary thereupon ceased to be custodian of the company's records, and the seal of the

company passed to the assignee out of control of the company and its officers; and consequently the certificate, not being executed till after the assignment, is invalid as evidence of defendant's liability under section 18 of the Canada Joint Stock Companies Letters Patent Act, 1869, and there was no other evidence. This not being an action by the company, is not "such action" as is contemplated by section 28 of that Act, and the plaintiff is not entitled to use such certificate as evidence.

January 24th, 1880. Moss, C. J. A., delivered the judgment of the Court.

We are of opinion that the judgment of the Court of Common Pleas is correct, and ought to be affirmed.

Although other questions were discussed at the bar, we need only concern ourselves with the enquiry, whether the directors of a company formed under the Joint Stock Companies' Act of 1869 (32 & 33 Vic. ch. 13, D.) can make or authorize an assignment in insolvency without the authority of the shareholders being obtained. We do not doubt the correctness of the general propositiou stated by Mr. McCarthy, that there is a broad distinction between the relation of a board of directors to the corporate body and that of an ordinary agent to a private principal. The powers of the board are not delegated by the stockholders, but are derived from and measured by the charter. The Act under which this company was constituted does not confer any exceptional or unusual powers upon the directors. It declares that the affairs of such a company shall be managed by a board of directors, and gives them a carefully limited authority to increase or reduce the capital stock. The 22nd section, which is specially devoted to a definition of their functions, gives them full power in all things to administer the affairs of the company, and to make for the company any description of contract which the company may by law enter into, and to pass by-laws in relation to stock, dividends, servants, meetings, and similar details, and to the conduct in all other particulars

of the affairs of the company. We think it is quite clear that these powers do not, and that there is nothing to be found in the statute which does, authorize them to make an assignment in insolvency. Indeed, it could not have been the intention of the Legislature to confer such a power, because at the date of the enactment, although an Insolvency Act was passed at the same session, there was no means by which an incorporated company could be brought within the operation of the Insolvent Law. In our opinion the powers, which are delegated by the Act to directors, are confined to transactions in the course of conducting the business for which the company has been formed, and do not extend to that which is in effect a destruction of the being of the company. They are appointed to manage the business of the company as a going concern, and not to take a step which virtually terminates its existence.

It is conceded that no direct English decision can be found in support of the appellant's view, but it is argued that upon the authority of such cases as *Wilson* v. *Miers*, 10 C. B. N. S. 348, and *Bank of Switzerland* v. *Bank of Turkey*, 5 L. T. N. S. 549, this power ought to be implied. The former case is no doubt an authority for the proposition that the powers conferred upon directors should be liberally construed, but beyond that general doctrine it does not seem to aid the appellant. We only desire to supplement the observations upon that case made in the Court below by a reference to the language of Willes, J., which seems clearly to point to the conclusion at which we have arrived. That very learned Judge said, at p. 366: "The Court ought rather to presume that the directors would have been well advised, and would have acted according to their duty; and on obtaining the £60,000 instead of proceeding forthwith to make a winding up of their own authority, they would have held a meeting, and taken the opinion of the shareholders, *as they were bound to do*, on the subject." Other passages occur in the judgment which indicate the necessity of taking the opinion of the share-

holders before such an irrevocable step as that of proceeding to wind up the company is taken. In the case in the Law Times the company had been projected, but not formed. The object of the suit was to restrain the directors from winding up the affairs of the proposed company, and returning to applicants for shares the amounts of their deposits. The point decided simply was, that as the greater part of the money had already been returned, an injunction should not be granted for keeping alive a company which had *de facto* been destroyed. But the Vice-Chancellor premised his judgment with the observation that perhaps he would have been far from holding that there might not have been a case for an injunction, if matters had remained as they appeared to the plaintiffs at the time of the filing of the bill. In other words, if so much of the money had not been actually returned, the case might have been different.

It does not appear to us that either the decisions in the United States, or the reasoning upon which they are founded, should lead us to any different conclusion.

We have then to turn to the Insolvent Act of 1875, to see if such a power is conferred upon the directors. That Act defines "Debtor" to mean "any person or persons, copartnership, company, or corporation having liabilities, and being subject to the provisions of the Act." It may well admit of doubt, however, whether the Legislature intended an incorporated company to be ranked among the debtors who can make a voluntary assignment. It is difficult to perceive how the sections preceding the 147th can be made applicable to a corporate body. Then that section has the heading: "Procedure in the case of incorporated companies." *Prima facie* this language would be taken to denote that the whole procedure by which such bodies might for the first time be made subject to the provisions of the Insolvent Act is given under this heading. There can now be no doubt that such a heading may be looked at in construing the ambiguous provisions of an Act. In *Eastern Counties R. W. Co.* v. *Marriage*, 9 H. L. C. 41, Channell, B., observed that these headings constitute

an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to to explain its enactments, but as affording a better key to the construction of the sections which follow them than might be afforded by a mere preamble. And in *Lang* v. *Kerr*, 3 App. R. 529, 536, where a section under consideration was headed: "Buildings, their erection, alteration and use," Lord Cairns, said: "I may observe that these headings in this Act are not to be looked upon as marginal notes inserted perhaps, not by Parliament, but by the printer, because they are referred to in the body of the Act itself."

These views might perhaps be presented as tending to shew that the only mode by which an incorporated company can be made subject to the provisions of the Act is by adopting the procedure prescribed in the 147th section. But we refrain from expressing any opinion upon that question, because it appears to us that there is in the language of the section intrinsic evidence that the Legislature, far from enlarging the powers of directors, did not even contemplate as possible the execution of a valid deed of assignment without the authority of the shareholders. Nothing in the section is to prevent the president, directors, managers, or employés, *on* being duly authorized to that effect, from making an assignment of the estate of the creditor before the expiration of the delays which the Court or Judge may have granted, instead of ordering the immediate issue of a writ of attachment. Now interpreting this most favourably for the appellant, and giving the fullest significance to the use of the term "prevent," as indicating the existence of a power already residing somewhere to make an assignment, it is clear that this power, the exercise of which is not to be *prevented*, is not vested in the directors without special authority being conferred. The language used as to authority shews that it must be *pro re natâ*, and directors require it as much as employés. We apprehend that it will scarcely be contended that a company could delegate to a paid secretary full power to

execute a valid deed of assignment in insolvency, at any time he might think proper.

We observe that the creditor who served a demand as preliminary to proceedings under the Act was himself a director, and that the resolution to make a voluntary assignment was passed at a meeting of this creditor and three other directors, all of whom seek to prove claims against the estate. This point was not discussed at the bar, but it appears to us that there are cogent reasons for thinking that such a course of action was contrary to the whole spirit and policy of the Act, as well as opposed to broad and obvious principles of equity. It may well be asked how could directors in such a position fairly represent the interests of their shareholders in settling upon the grave step of winding up the affairs of the company.

We think that the appeal should be dismissed, with costs.

Appeal dismissed.

Ryan v. Ryan.

Statute of Limitations—Possession as caretaker—Tenancy at will—Subsequent entry of owner—Creation of new tenancy.

In 1849, the plaintiff's father, who owned a block of four hundred acres of land, consisting of lots 1 in the 13th and 14th concessions of Wellesley, offered him the choice of 100 acres, if he would live on it and take care of the remaining three hundred acres. The plaintiff selected the south half of lot 1 in the 13th concession, and lived thereon, taking care of the residue of the block till 1864, when he sold his 100 acres and moved on to the north half of this lot 1, where he had resided ever since. The father died in 1877, having devised the north half of this north half to the defendant, another son, and the south half thereof to the plaintiff. The defendant claiming under the devise entered, whereupon the plaintiff brought trespass, claiming title by possession. It appeared that the plaintiff had erected buildings on the land in question, and cleared and cultivated it, taking the profits to his own use; and since 1865 the lot had been assessed in his name, and he had paid the taxes thereon. The plaintiff occasionally visited his father and told him what improvements he was making on the lot. The defendant swore that in 1871 he was sent by his father to the plaintiff to remonstrate with him for cutting timber and destroying the land, and to tell him that if he did not pay the taxes he would give the land to some one else; and that the plaintiff promised to cut no more and to pay the taxes.

Held, reversing the judgment of the Common Pleas, 29 C. P. 449, Patterson, J.A., dissenting, that the plaintiff held the land in question as tenant at will, not as caretaker and agents of his father, and that there had been no determination of the original tenancy, without which a new tenancy could not be created, and that he was therefore entitled to recover.

Per Patterson, J A., that it was not necessary to shew a substantive act determining the tenancy, as for the purposes of the statute, a tenant at will ceases to hold as such at the end of the first year; and that what took place between the plaintiff and defendant was sufficient to prove a new tenancy at will.

This was an appeal from a judgment of the Court of Common Pleas, discharging a rule *nisi* to enter a verdict for the plaintiff, 29 C. P. 449. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 16th May, 1879 (a).

W. H. Bowlby for the appellant. As no contract of hiring existed between the plaintiff and his father, he was a tenant-at-will from the day he took possession, and the statutory bar became complete on the 17th of September, 1870. The fact that he was a caretaker does not affect

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the question, as the doctrine of non-adverse possession is abolished: *Truesdell* v. *Cook*, 18 Gr. 532, 538; *Heyland* v. *Scott*, 19 C. P. 165, 172; *Williams* v. *McDonald*, 33 U. C. R. 423, per Richards, C.J., at p. 436; *Doe dem. Taylor* v. *Proudfoot*, 9 U. C. R. 503, 507. The act of the plaintiff in leasing the north half of the lot in 1863 to Richardson as tenant to himself or his father, did not amount to a determination of the original tenancy-at-will, because the father knew of such letting to Richardson, but nevertheless suffered his authority to the plaintiff to continue, and the forfeiture (if any) was therefore waived; but whether there was a determination of the original tenancy or not, the Statute of Limitations, having begun to operate in 1850, would not be defeated except by the creation of a new tenancy. At any rate, the statute began to run on the 3rd of December, 1864, when the plaintiff, without the knowledge, or without the consent of his father, entered as a trespasser on the land in question and took actual visible possession thereof, which was open and notorious. It is quite clear upon the evidence that the tenancy-at-will was not determined upon the occasion when the defendant saw the plaintiff in presence of Clark, some seven years before the trial (about 1871), and it is equally clear that no fresh tenancy was then created. It is submitted that the alleged agreement or promise by the plaintiff to pay the taxes is clearly disproved by the evidence, and that even if such an agreement had ever really existed it would not have made any difference, because *primâ facie* the plaintiff, as the occupant of the land, was bound to pay the taxes. See the observations on this head of Richards, C. J., at p. 436 in *Williams* v. *McDonald*, 33 U. C. R. 423; *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486, 492. If it were agreed (although it was not proved) that the plaintiff should pay the taxes on the 200 acres in the 14th concession, as an uncertain yearly rent for the 100 acres in the 13th concession, after the 14th of January, 1865, (as intimated in the father's letter,) then there is no evidence that he paid such taxes during the

period of limitation: R. S. O. ch. 108, sec. 5, sub-sec. 6. The finding as a fact by the learned Chief Justice of the Queen's Bench, at the trial at *Nisi Prius*, that the plaintiff lived on the south 50 acres of the north half of the said lot, and used the most northerly 50 acres of the said lot as agent for his father, clearing some of it, taking timber off part and protecting it for his father, cannot be supported by the evidence, if intended to be a finding that the two 50 acre parcels were treated or occupied differently in any way, or if intended to be a finding that the possession of the north 50 acres was of any different nature from that of the south 50 acres, as shewn by the judgment of the learned Chief Justice of the Common Pleas. If it be conceded that the possession of the land by the plaintiff was in the character of a caretaker or agent of his father, who always allowed the plaintiff to receive the whole profits of the land to his own use and benefit, and who never gave, or agreed to give, the plaintiff any wages or remuneration for his services, as such caretaker or agent, still the statute would run against the father, because that possession was not incidental to a contract of hiring such as the possession of a farm servant or gardener would be. The present statute runs against the true owner, whatever be the nature of the possession. The possession of a caretaker or agent receiving in return for his trouble the whole profits of the land for his own benefit is, by the statute, made adverse for the purpose of limitation. This is settled and determined by the authority of the case of *Truesdell* v. *Cook*, 18 Gr. 532, and the other cases above mentioned. He cited *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486; *Keffer* v. *Keffer*, 27 C. P. 257; *Gray* v. *Richford*, 1 App. R. 112; *Doe d. Baker* v. *Coombes*, 9 C. B. 714; *Williams* v. *McDonald*, 33 U. C. R. 423; *Day* v. *Day*, L. R. 3 P. C. 751; *Banning's* Limitation of Actions, pp. 96, 98, 103, 118, 140, 141; *Orr* v. *Orr*, 31 U. C. R. 13; *Rumrell* v. *Henderson*, 22 C. P. 180; *Holmes* v. *Holmes*, 17 Gr. 610; *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310, and observations of Robinson, C. J., at p. 317; *Hemmingway*

v. *Hemmingway*, 11 U. C. R. 237; *McArthur* v. *McArthur*, 14 U. C. R. 544; *Dundas* v. *Johnston*, 24 U. C. R. 547; *Davis* v. *Henderson*, 29 U. C. R. 344; Doe *d. Bennett* v. *Turner*, 7 M. & W. 226, and 9 M. & W. 643; *Mollett* v. *Robinson*, 39 L. J. C. P. 290.

McCarthy, Q.C., and *J. King*, for the respondent. It cannot be contended that prior to 1864 the appellant had any possession at all. After that date he was simply a servant, agent, or caretaker of his father, and his occupation was in fact the possession of his father, and not adversely to him, or as tenant under him: *Doe d. Perry* v. *Henderson*, 3 Q. B. 486; *Quinsey* v. *Canniff*, 5 Q. B. 602; *Doe d. Silverthorn* v. *Teal*, 7 Q. B. 370; *Heyland* v. *Scott*, 19 C. P. 165; *Ellis* v. *Crawford*, 5 Ir. L. R. 404; *Moore* v. *Doherty*, 5 Ir. L. R. 449. If the occupation of the appellant was not as caretaker or agent, but as a trespasser, or as tenant, a new tenancy was created at the time that the respondent, as agent for his father, visited the appellant, and entered upon the land, as detailed in the evidence, about seven years before the action was brought: *Doe d. Shepherd* v. *Bayley*, 10 U. C. R. 310; *Hodgson* v. *Roper*, 3 E. & E. 149; *Doe d. Groves* v. *Groves*, 10 Q. B. 486; *Doe d. Stanway* v. *Rock*, 4 M. & G. 30; *Turner* v. *Doe d. Bennett*, 9 M. & W. 643; *Keffer* v. *Keffer*, 27 C. P. 257; *Day* v. *Day*, L. R. 3 P. C. 751; *Heyland* v. *Scott*, 19 C. P. 165; *Dundas* v. *Johnson*, 24 U. C. R. 547; *Young* v. *Elliott*, 25 U. C. R. 330. In any view that the case presents, the appellant's possession was only of the south half of the land in question: *Young* v. *Elliott*, 25 U. C. R. 330. There was always a distinction observed by the appellant's father between the halves of the lot, and this distinction was well known to the appellant. The building erected on the north half by the appellant was so erected in mistake as to the position of the true line between the north and south fifty acres, the appellant assuming (erroneously as it now appears) that he was building on the south half. There is no evidence of possession of the north fifty acres which would warrant a finding in appellant's favour under the Statute

of Limitations. If not occupying as a servant, caretaker, or agent, the appellant was a tenant, paying as rent the taxes, not merely of the land in question, but of his father's other lands, and there is evidence that such taxes were paid by him within ten years before action brought.

January 26, 1880. MOSS, C. J. A.—With the greatest respect for the opinions of the learned Judges who seem to have arrived at the conclusion that upon the evidence the plaintiff ought to be deemed a caretaker of the premises he now claims, I am unable to adopt that view. He entered into actual occupation without any authority from his father, the owner. He took possession for his own benefit, and in order to derive sustenance from the land, as long as his father did not interfere. He commenced and continued to use it according to his own pleasure. He communicated to his father that he had taken possession, and impliedly asked his assent to continuing in possession, but he said nothing of being a bailiff or guardian of the property. These facts are beyond doubt, and the law is, I think, equally clear. It was thus explained by Pennefather, B., in *Ellis* v. *Crawford*, 5 Ir. L. R. 402, at p. 404: "We all think that this is not the case of a mere caretaker or servant, but that of a person claiming the possession in himself. The distinction is this, that if you put a servant into possession of premises, you can turn him out without a previous demand—for the possession of the servant is that of his master; but if you let a person into possession whom you cannot turn out without a previous demand, the case is different; and here we feel satisfied from Mr. Crawford's letter that his possession was one from which he could not have been removed without a demand of the possession having been previously made. In short, we think that the situation of the parties was not that of employer and employé." The same principle seems to be recognized in *Lessee of Moore* v. *Crawford*, 5 Ir. L. R. 449, and *Lessee of Montmorency* v. *Walsh*, 4 Ir. L. R. 254. But I am content to rest upon the high authority of Strong,

V. C., who, when deliver g judgment in *Truesdell* v. *Cook*, 18 Gr. 535, said: "It was argued that the plaintiff's father was in possession as a mere caretaker or servant of the true owner; but I am of opinion that this is not the correct result of the evidence. I concede that where it is shewn that a contract of hiring exists between the parties, and the possession has been incidental to that contract, the statute does not operate. But where, as in the present case, no such relationship existed between the parties, and the party in possession has been let in upon the terms of performing certain services upon the land, taking in recompense the profits of the land, a tenancy at will is created." That statement of the law, if correct, as I think it is, concludes this point. The result is, that the plaintiff, by virtue of his father's assent to his retaining the possession he had taken, afterwards held as tenant at will.

I believe we are all of opinion that, if there was a tenancy at will, it was not determined by the interview between the defendant as his father's agent, and the plaintiff. There was no entry or resumption of possession by the defendant on his father's behalf. There was nothing but a conversation between the brothers, which was not even held upon the disputed premises. The conversation did not reach the length of an actual determination of the tenancy. In fact, the father had not authorized such a step. He had only empowered the defendant to convey an angry remonstrance against the mode in which the plaintiff was using the property. This the plaintiff seems upon the evidence to have received in sullen silence, and without any promise of any amended behaviour. Indeed, it requires no lively imagination, and but slight knowledge of human nature, to sketch a picture of the character of the interview between two such men. If there was no actual determination of the original tenancy, either by the act of the parties or by operation of law, there could obviously be no creation of a new tenancy. The question, therefore, is, had there been a determination by operation of law. If there had been, so that at the time of this

interview the plaintiff was to be deemd a mere trespasser or a tenant at sufferance, even the little that then passed, coupled with his continued possession, and still more with what must be inferred to have taken place on the occasion of the visits of the plaintiff and his wife upon the old man, may suffice to have created a tenancy at will, the origin of which must be dated later than this interview.

This confronts us directly with the construction of the 7th section of ch. 88 Consol. Stat. U. C., which enacts that when any person shall be in possesion or in receipt of the profits of any land as tenant at will, the right of the person entitled subject thereto, to make an entry or to bring an action to recover the land, shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year after the commencement, at which time such tenancy shall be deemed to have determined. If the matter were *res integra*, there would be cogent reasons to be advanced in favour of the view that for all purposes of the statute the occupant was after the expiration of the year to be treated as and deemed either a tenant at sufferance or a mere trepasser, to the full extent of enabling the owner to insist that any dealing which would have had the effect of turning a trespasser into a tenant at will should place him in the same position. A different construction may, perhaps, be open to the objection pointed out by my brother Patterson, that it seems to expunge the words "at which time such tenancy shall be deemed to have determined." It might, however, be answered that this was by no means a solitary instance of the appearance of superfluous language in even a carefully prepared statute. But be that as it may, I think there is a current of authority in the opposite direction too strong for us now to resist. It seems to me that it must now be taken to be settled that both a determination of the original tenancy at will, and the creation of a new tenancy, are necessary to stop the running of the statute. The acts done must satisfy both these requisites, and it will not suffice for

the establishment of a new *terminus a quo* to prove what might be sufficient to turn a trespasser into a tenant.

The authorities in support of this view have on different occasions been fully examined in our courts, as for example in *Williams* v. *McDonald*, 33 U. C. R. 423, and especially in *Keffer* v. *Keffer*, 27 C. P. 257. I may well content myself with referring to these cases for an exposition as well of the English decisions, as of the earlier judgments of our own Courts. The opinion in the latter case seems to me to present in a clear and comprehensive summary all the learning on the question to be gathered from the books. One passage from the judgment, p. 284, is exceedingly apposite: "There was no intention that the son's continuing to hold should be in any respect different from what it had theretofore been. There was no intention upon the part of the father to resume possession, or upon the part of the son to give up possession, or to enter into any fresh terms as to possession under a new tenancy. The act of creating the mortgage was conformable with the son's continuing in occupation under the identical terms upon which he had first entered." Again it is said, p. 285: "Assuming, however, the execution of the mortgage to operate as an actual determination of the original tenancy, the statute having already begun to run, its running was not stopped thereby, unless a new tenancy was created by a fresh agreement between the parties."

I have looked in vain through the evidence in the case before us for any proof of the creation of a fresh tenancy, and as I think that the view of the law thus enunciated is fully sustained by the highest authority it is decisive of this case. For authority it is unnecessary to go beyond the case of *Day* v. *Day*, L. R. 3 P. C. 751, which I need not say is absolutely binding upon this Court. There facts were presented which, apart from any question arising under the statute, would have amounted to a determination of the tenancy at a date after the expiration of a year from its commencement. But after

the happening of these events the original tenant remained in possession with the knowledge and consent of the owner. There were as strong grounds in that case, as in this, for inferring the creation of a tenancy at will, if after the expiration of the year the occupant was absolutely to be treated as a trespasser, or as no longer in possession as tenant at will.

But the Court pointed out that the acts which were relied upon to shew that the original tenancy was determined were consistent with the character confided to the occupant and were beneficial to the property. So in my opinion were the acts which the present plaintiff did. The Court also laid it down that as the statute began to run at the end of the year, the question of the subsequent determination of the original tenancy was only relevant so far as it might have been preliminary to the creation of a fresh tenancy at will after the determination of the first. Again, this language is used at p. 762: "Assuming that there was a determination of the tenancy, and that the occupation, of Thomas Day, the son, continued without interruption, to the knowledge and with the sanction of Thomas Day, the father, this would constitute an occupation at sufferance to all intents, and so far as related to the purposes of the statutory bar no alteration would be made in the *status* of Thomas, the son." There is to my mind some difficulty in following the exact train of reasoning which the Court here adopted, but it is not the less my duty to accept it as an authoritative exposition of the law. In the case we are now considering there is no room for the assumption of a determination of the tenancy by the act of the parties, independently of the statute, and the occupation of the plaintiff continued without interruption to the knowledge and with the sanction of his father. It follows that according to the Privy Council no alteration was made in his *status*, so far as relates to the purposes of the statutory bar. But whatever difficulty there may be in tracing the process by which the Court arrived at the con-

clusion I have just quoted, there is none in grasping the import of the following passage at p. 763: "The language and policy of the statute require that to constitute this new *terminus a quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy, at will." These conditions cannot, in my humble judgment, be found in this case, and I am therefore of opinion that the running of the statute was never stopped, and that it gave the plaintiff a valid title.

I have not felt impelled by any sympathy for the plaintiff's contention to go a hair's breadth beyond the line of strict law. I think he might have well respected the wishes of his dead father, from whom he had during his life received such benefits, and who had not forgotten him in his will; but the course that propriety required is for him to determine. I think, however, that there is no reason for awarding him substantial damages, under all the circumstances that have been proved. The sum of $10 is in my opinion an ample *solatium* for the trespass of which he complains. For that amount the verdict ought to be entered, and the appeal must, in my opinion, be allowed with costs.

BURTON, J.A.—The decisions seem clearly to establish that where, as in this case, no contract of hiring exists, but the party in possession has been let in upon the terms of performing certain services, taking in recompense the whole profits of the land, a tenancy-at-will is created; and the finding, therefore, of the learned Chief Justice at the trial, that the plaintiff was a mere caretaker, cannot be sustained; it not being possible, in my opinion, to draw any distinction between his occupation of the north and the south fifty acres.

We are, therefore, driven to consider whether there was, at any time, a determination of the original tenancy, and a new tenancy-at-will created between the father and the plaintiff.

What occurred between Thomas Ryan and the plaintiff is not sufficient for that purpose, unless the construction placed upon the statute by my brother Patterson be the correct one. However I might have been disposed to accede to that view, if we were considering the statute for the first time, I do not think it is open to us, after the repeated dicta to the contrary since the passage of the Act, and especially the clear expression of opinion by the Court of ultimate resort from the Courts of this Province, in the case of *Day* v. *Day*, L. R. 3 P. C. 751, to adopt the conclusion that the plaintiff was, for all purposes, and not merely for the purposes of the bar of the statute, a tenant at sufferance after the end of the first year.

In the case of a tenancy-at-will, a right of entry may be said to exist in the landlord from the first moment of the creation of the tenancy, for he may enter at any time and determine the will. It was, therefore, necessary to fix a period when, for the purpose of the statute, the time should begin to run. This was effected by declaring that the right to bring an action should be deemed to have first accrued, either at the determination of the tenancy within a year, or at the expiration of a year from its commencement, at which time, as I read the section, the tenancy should be deemed or regarded as ended, for the mere purpose of fixing a period from which the statute should commence to run, but without any actual determination of it.

If the tenancy-at-will had been actually determined before the expiration of a year from its commencement, the plaintiff would have become a mere tenant-at-sufferance; and what occurred at the interview between Thomas, as the agent of his father, and himself, might not unreasonably perhaps be held to have created a fresh tenancy-at-will.

But I cannot, consistently with the authorities, bring myself to the conclusion, that although the right of the person entitled accrued at the end of a year from the commencement of a tenancy, the person in possession ceased, for other purposes, to be tenant-at-will. In practice it has

always been deemed necessary to determine such tenancy by demand of possession, before proceeding by ejectment, although the tenant may have been in possession for many years after the expiration of the time at which the statute declares that such tenancy shall be deemed to have determined. If this view be correct, there is nothing in the evidence to show the determination of the first tenancy and the creation of a new one. The elder Ryan did not, either personally or by his agent, enter upon the premises with the view of terminating the tenancy. The interview with Thomas was upon the adjoining lot; and, assuming the plaintiff to have been then a tenant-at-will, there was nothing that occurred at that interview inconsistent with the continuation of the original tenancy; and, as remarked in the case decided in the Privy Council, which has been referred to, the language and policy of the statute require, that to constitute this new "*terminus à quo*" the agreement for a new tenancy should be made by the parties with a knowledge of the termination of the former tenancy, and with an intention to create a fresh tenancy-at-will. It seems to me, therefore, that as the statute began to run certainly in December, 1864, if not at an earlier date, nothing has occurred subsequently to prevent its running, and that the plaintiff is entitled to recover.

PATTERSON, J. A.—This is in action of trespass brought by Michael Ryan against his brother Patrick Ryan. The declaration charges the breaking and entering of the northerly half of lot number one, in the 13th concession, western section, of the township of Wellesley.

It will be convenient at once to distinguish the *locus in quo* into two parts, viz., the north half of the north half, otherwise the north quarter of the lot, and the south half of the north half of the lot.

The defendant has no title whatever to the latter portion. His only title to any part of the lot is under his father's will, which devised to him the north quarter, together with other lands not in question here.

The same will devised the south portion to the plaintiff, whose title to it is therefore indisputable by this defendant. But the plaintiff contends he had, before the year 1877 when the father died, acquired title to both portions against him under the Statute of Limitations. The real question is thus the plaintiff's right by possession to the north quarter. But while the defendant does not dispute the plaintiff's title to the southern part, he has committed no trespass on it. He has merely entered on the north quarter in the assertion of his right as devisee of his father.

The pleas are: 1st. Not guilty. 2nd. Not possessed. 3rd. *Liberum tenementum.* 4th. Leave.

Whatever may be the result upon the question of the statute, the plaintiff is manifestly entitled to succeed on the second and third pleas, so far as they relate to the south part of the half lot; and the defendant is entitled to succeed upon the first plea, so far as it denies any trespass on that portion of the *locus in quo.* Under the rules of pleading as explained in *Phythian* v. *White*, 1 M. & W. 216, and *Giles* v. *Groves*, 12 Q. B. 721, the plea of not guilty may be taken to be pleaded separately to the charges of trespass to each half of the land, and the other pleas may be taken distributively. This will, in the event of the defendant ultimately succeeding as against the Statute of Limitations, enable the plaintiff to have the *postea* so drawn and judgment so entered as not to cast any doubt upon his title to what he really owns.

The case comes before us as an appeal upon questions of fact.

The issues were tried before the Chief Justice of the Queen's Bench without a jury. It was shown that Thomas Ryan, the father of the litigants, had put the plaintiff in possession of the south half of this same lot number one, intending to give it to him, and had given him a conveyance of it in 1859. The plaintiff sold that land in 1864, and moved on to the north half, where he has continued to live. The character of his occupation of the north half was the subject of contest. Was it as caretaker or agent

for his father? Or was it as tenant at will? More than eleven years from the time when he went into possession having elapsed before suit, it became important to inquire whether, in case his tenure was originally as tenant at will, there had been within the eleven years a renewal of the tenancy. It was contended on the part of the defendant, that a fresh tenancy had been created in 1871, as the effect of what took place between the plaintiff and the defendant, who had been sent by his father to see the plaintiff upon the subject of the land. After hearing the evidence adduced upon these several topics, the learned Chief Justice made the following note of his finding:

"For the present I enter a verdict for the defendant. The case must be argued in term.

"The difficulty arises as to the effect of this occupation for over ten years before the bringing of this action, and that will require serious consideration. The claim to these fifty acres seems very unjust. The plaintiff never was promised over 100 acres, which he got and sold in 1859, [1864,] and his father, as I understand, devised the south fifty acres of this half lot to him in addition. *Whatever occupation the plaintiff had of this land was acting as agent and caretaker for his father*, and as between the father and a stranger I think plaintiff's possession would be the father's possession. On the evidence it seems the father used to send up money to pay the taxes till seven or eight years ago. He then said, knowing plaintiff was using it, that he must pay the taxes for the use of the land. *I find as a fact that plaintiff, even to his father's death in* 1877, *did not occupy or claim it as his own against his father, but merely as acting for him, living on the south fifty acres and using this north fifty (now in suit), clearing some of it, taking timber off some part and protecting it.* Within the ten years it is sworn by defendant that he was sent by his father to complain to plaintiff of his cutting timber, &c., and told him so, and plaintiff promised to forbear and to pay the taxes if he was left on this place until the father would want it (see defendant's evidence on this head."

I italicise the passages which contain the findings of fact relating to the nature of the plaintiff's possession.

I do not understand it to be contended that if that finding be sustained, the Statute of Limitations has any application. The correctness of that conclusion of fact is however disputed.

In the Common Pleas the learned Chief Justice held that the plaintiff could not be considered as occupying the land in the character of agent or caretaker, but was tenant at will to his father; and he was further of opinion that no renewal of the tenancy had been established; and that therefore the statute had run in the plaintiff's favour.

The only other Judge of the Court when judgment was delivered was Mr. Justice Galt. The argument had been heard also by Mr. Justice Gwynne, who had written a judgment; but he was removed to the Supreme Court before it was delivered. Mr. Justice Galt agreed with the views expressed by Mr. Justice Gwynne, and read the judgment as his own.

Those two learned Judges held that, if there was a tenancy at will, a new tenancy had been created in 1871, which intercepted the operation of the statute; but they were also inclined to agree with the decision pronounced at the trial that the plaintiff had been only caretaker for his father.

The formal result was that, the Court being equally divided, the rule was discharged in order to enable the plaintiff to appeal to this Court.

For my own part I confess some difficulty in arriving at a distinct conclusion one way or other on the question of the renewal of the tenancy. Upon this point, at least, the case is presented to us under somewhat peculiar conditions. Much stress was laid upon this point in the Court below. It was treated, as has been expressly pointed out in both the judgments read, as turning upon questions of fact. The solution of these questions depended on evidence which was conflicting, and the details of which have been discussed in the judgments. From that discus-

sion it is obvious that the reliance to be placed on the testimony of one witness or another became a very material element in the decision. It was, therefore, a case in which the opinion of the Judge who heard and saw the witnesses would have been of great value, and ought to have been conclusive whenever the choice lay between conflicting versions of the same incident. It would, however, appear that this question of the tenancy at will cannot have been made very prominent at the trial, at all events in the form it assumed before the Court in banc; as we have no direct finding upon the points upon which the Judges afterwards formed opinions so different from each other.

We are now asked to find, upon the evidence reported to us, certain facts not pronounced upon by the Judge at the trial, and which, owing to the difference of opinion which I have mentioned, were not decided by the Court in banc.

Assuming, for the purpose of this branch of the case, that the tenure of the plaintiff was as tenant at will to his father, we have to say whether or not a new tenancy is shewn to have been created in 1871, on the occasion of the defendant's visit as his father's ambassador to the plaintiff.

This has been treated, as I have said, as a question of fact, and I do not doubt that it has been properly so treated. But in attemping to deal with it upon the evidence, I am met at the outset by a question of law. In order to create a new tenancy at will for the purpose of interrupting the running of the statute in favour of your tenant at will, is it essential that an act shall be done which amounts to a determination of the will, before any fresh tenancy can be created? If such an act is necessary, I have to confess myself unable to find evidence of it satisfactory to my mind. I think that what took place at the visit, as detailed by the witnesses who speak of it, viz., the plaintiff, the defendant and Thomas Clark, and whichever version of the story we adopt, is consistent with the recognition by the father of the plaintiff as his tenant at will. It involved, no doubt, a threat to determine the will if the terms conveyed by

the defendant were not acceded to; but it did not amount to a present determination. There was no entry upon the land by the defendant in the father's name, such as to amount to a resumption of possession as against his tenant, and which, if it had occurred, would have given the statute a fresh start whether a new tenancy had been created or not, as in *Randall* v, *Stevens*, 2 E. & B. 641. He seems merely to have gone to the plaintiff's house for the purpose of seeing him and delivering his message, when, finding him from home, he followed him to the adjoining lot in the fourteenth concession; and there it was that their conversation took place. Other acts of the defendant which were spoken of, such as forbidding persons to take timber, would not have been acts of trespass as against the plaintiff, one of the terms of whose tenancy, he was tenant, forbade his cutting timber except for his own use. Acts of this kind would not, therefore, indicate a determination of the will, like the quarrying of stone in *Doe Bennett* v. *Turner*, 7 M. & W. 226, or the removal of a stone from the wall, in *Doe Baker* v. *Coombes*, 9 C. B. 714. And as I have already said, the communication made to the plaintiff was not an announcement that he was no longer tenant.

But how far is such a substantive determination of the will essential? The following passage from Darby and Bosanquet's Treatise on the Statutes of Limitations, p. 261, gives the general doctrine, which is to be found enunciated in many cases: "Where a tenancy at will is actually determined before the twenty-one years are expired, and a new tenancy at will is created, the section now under discussion does not apply to the first tenancy, and its effect must be considered with reference only to the last tenancy at will created before the question of title is raised. This was first settled in *Doe Bennett* v. *Turner*, 7 M. & W. 226, on a motion for a new trial, and again in the Exchequer Chamber, 9 M. & W. 643, on a bill of exceptions to the ruling of the Judge at the new trial, and it has been constantly followed, and must be considered as settled law."

This, it will be observed, while it states the now well settled ru'e, that when there is the concurrence of the two conditions, viz., the determination of one tenancy at will and the creation of another, the last created tenancy is that to which the provisions of the statute apply, only inferentially affirms the proposition that there must be some act of substantive determination of the first tenancy at will. The cases by which the rule as stated is supported are all, so far as I have observed, cases in which the two facts were found to co-exist, namely, one act on the landlord's part putting an end to the first tenancy at will, and an agreement proved either by words or acts, constituting anew the relation of tenant at will. I do not remember any case in which a dealing between the parties, sufficient in itself to afford evidence of the creation of a tenancy at will, had taken place, and where it was held that that result had not followed by reason of an already existing tenancy not having been determined. It may be that no such position as this could well arise. It may be that the very negociation for possession of land or house, or request made and permission given to occupy it, if sufficient to evidence the creation of a tenancy at will, would necessarily involve the admission that no such relation already existed, and so would preclude any question of how the previous tenancy at will had come to an end. However this may be, I do not know of any actual decision that such an agreement would not interrupt the running of the statute. To speak of the creation of a new tenancy before the old one had been determined, may appear to savour of a contradiction in terms; and, apart from the statute, there may be no occasion to discuss the possibility of such an occurrence. It is only in relation to the statute that the question arises.

The seventh sub-section of sec. 5 of the R. S. O., ch. 108, provides that where any person is in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make

an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

For the purpose of this statute the tenancy at will ends at the end of one year. The principle of law which forbids a tenant disputing the title of his landlord is respected by the statute when it declares that the time shall only begin to count in favour of the occupant when he ceases to be tenant; or, conversely, that he is deemed to be no longer tenant as soon as he becomes entitled to reckon the time of his possession as making title against his landlord.

When, therefore, we treat the tenancy at will as continuing to subsist, and requiring some positive act to determine it, we overlook, in my judgment, the concluding words of the subsection, and construe the enactment precisely as if those words were not there. For the mere purpose of declaring the rule of limitation as applicable to the case of tenants at will, those words are unnecessary. The rule is completely formulated without them.

I find allusions to this effect of the statute in some cases, although I am not aware of any decision which has actually turned upon it. Thus in *Doe Goody* v. *Carter*, 9 Q. B. 863; Patteson, J., said, (p. 867,) "I doubt if there can now be a continuous tenancy at will. There may be a new one every year. Statute 3 & 4 Wm. IV, ch. 27, sec. 7, considers tenancy at will as determining at the end of one year after its commencement." Counsel suggested "That is for the purpose of the twenty years limitation." To which Patteson, J., replied, "It seems to be for all purposes." In *Randall* v. *Stevens*, 2 E. & B. 641, there are several dicta on the subject. Lord Campbell, C. J., at p. 644, asked counsel, "Do you say that where there is no payment of rent a tenancy at will cannot exist more than a year." Counsel answered, "For the purposes of the statute it can-

not." Coleridge, J., remarked, "You apply that, I suppose, only to a tenancy at will in the strict sense of the words." To which the reply was, "No further." And when the argument was pressed that the tenancy at will was determined at the end of one year from its commencement, by the express words of section 7, and there could not therefore be a determination afterwards, and that so the enactment seemed to have been understood by Lord St. Leonards in Sug. V. & P. p. 622, 11th ed., Crompton, J., said, "That is, if there be no express determination of the will, the Legislature construes it to have been determined at the end of the first year." In giving the judgment of the Court Lord Campbell said, (p. 651,) "It is difficult to contend that, universally, every tenancy at will shall be deemed to have expired by operation of law at the expiration of one year after its commencement; and the more reasonable construction to put upon the enactment might have been, that where there has been no actual determination of the tenancy by act of the parties within twenty-one years, it shall be deemed to have determined at the end of the first year; making an occupation of twenty-one years without payment of rent a bar; but where there has been an actual determination of the tenancy within that period, whereby a new right of entry accrues, this clause of the statute shall have no operation, 'such tenancy' being supposed by the statute to continue till the right of entry is barred." And further on he said, at p. 652: "It may now be too late to consider, except in a Court of Error, whether, where the tenant has remained in possession continuously for twenty-one years, the tenancy at will being determined during that time by an act of the landlord without his having actually been in possession, there be any ground for the distinction as to the operation of the statute between a subsequent tenancy at sufferance and a new tenancy at will, which is allowed to create no bar." In giving his judgment in *Locke* v. *Matthews*, 13 C. B., N. S. 753, Willes, J., after quoting the passage I have just cited said, (p. 767,) "It may be that on the true con-

struction of the statute, the periods of the original tenancy at will and the subsequent tenancy on sufferance, [that is to say, the occupation of the original tenant after the landlord had, without taking possession, determined the tenancy at will, but no new tenancy at will had been created,] could not under such circumstances be united so as to make up the period of limitation required by the statute; but in order to raise that point recourse must be had to a Court of Error."

The construction, thus ineffectually suggested, that the statutory determination of the tenancy-at-will, at the end of a year, applied only where the landlord failed to determine it by some act of his own during the twenty-one years had been decided in *Doe Bennett* v. *Turner*, 7 M. & W. 226, and other cases, to be inadmissible. That being settled, I think the only other reading of which the clause is susceptible is that, for all purposes of the statute, the tenancy-at-will must be deemed to have ceased at the end of the year. I should judge from Lord Campbell's allusion to the difficulty of adopting this interpretation, that it was the only alternative construction which occurred to him. His remark, however, seems to indicate that he regarded the construction which he was inclined to condemn as causing every tenancy-at-will to expire, by operation of law, at the end of the first year for all purposes, and not merely when the statutory limitation was in question; and perhaps this may be what was presented to his mind as a difficulty.

In *Day* v. *Day*, L. R. 3 P. C. 751, which is, I think, the latest English case I have seen on this immediate subject, a father had, in 1842, let his son into possession of land as his tenant-at-will. The question was whether, after the lapse of twenty-one years, the son had acquired title as against his father. It was contended that the two things had happened: a determination of the original tenancy by acts of the son, in letting and otherwise dealing with portions of the property; and the creation of a new tenancy by the father allowing the son, or the son's tenants, to continue in occupation.

The jury had found, in answer to questions, that the authority given by the father to the son to occupy the property was not upon condition, but in perpetuity in his own right; that the acts of letting and transferring of portions of the property by the son were not in violation of the authority given by the father; that these acts were done with the father's knowledge and assent, and that no fresh authority was afterwards given. It was held that the statute had run in favour of the son. It was expressly decided that, assuming there was a determination of the tenancy, the subsequent occupation would create only a tenancy-at-sufferance. It was said, at p. 762, "There was no revesting of possession; the running of the statute was in nowise impeded. Doubtless an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved as ought to satisfy a jury that the parties actually made such an agreement; and in that event, it is proper to be found by a jury as a material fact in issue. No such evidence has been given in this case." It was also the opinion of the Judicial Committee that the finding was correct; that the acts of the tenant, which were relied on as shewing a determination of his will, had not had that effect.

I do not gather from this judgment that such a thing as the creation of a new tenancy without the actual or active determination of the old one was distinctly in the contemplation of the Committee. And it will be noticed that, while there is the express decision that the tenant's will was not shewn to have been determined, that finding was not essential to the disposition of the case; because it was also held that nothing had been done sufficient to create a new tenancy; and so, even if the original tenancy had been put an end to, the statute would have continued to run.

I think some of the language of Sir Joseph Napier, who delivered the judgment, seems consistent with the view of the statute which I am taking, or at least it shews the semblance of confusion of ideas which I think inseparable

from the attempt to treat the tenancy as at once existing and at an end. He said, at p. 760: "It seems to their Lordships that, as in this case the statute began to run from May, 1843, the question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy-at-will after the determination of the first, and within the period of limitation. In any other view, such a determination of the original tenancy, after the end of the first year, is *per se* irrelevant. * * The actual subsequent determination of the tenancy could only have the effect of making the tenant, for *all* purposes, when he was already, from the end of the first year, for the purposes of the bar of the statute, a tenant-at-sufferance. * * When the statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored, either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will."

Whatever may be the difficulties in the way of holding that even for the purpose of the creation of a fresh tenancy-at-will, when such a fresh tenancy becomes a factor in the problem of the operation of the statute, the original tenancy must be treated as having ceased at the end of the first year, the other view strikes me as involving difficulties quite as serious. It requires us to treat the tenancy as at the same time existing and determined: determined by the express enactment of the statute, and yet existing until determined by the act of the landlord. And when we regard the occupant of the land as still the tenant of the owner, because the latter has not determined his will, while at the same time he is, by virtue of the statute, acquiring title against his landlord, we make the case an exception

to the ordinary law of landlord and tenant, which, I think, the statute is careful to avoid.

Then if it is the proper result of the statute that, after the first year, the tenancy-at-will must be regarded as having expired, there remains no obstacle, in the shape of an existing tenancy, to prevent full effect being given to whatever understanding, tending towards the creation of a new tenancy at will, may have existed between the parties.

After the end of the first year—in this case after December, 1865—the tenant became in the view of the statute either a trespasser or a tenant at sufferance. There is nothing to hinder one occupying land in either of these characters from becoming tenant at will to the owner of the soil. In *Ley* v. *Peter*. 3 H. & N. 101, the defendant was in wrongful possession of the plaintiff's land, and set up the Statute of Limitations as a bar to the plaintiff's right of entry. A letter written by a land agent was offered in evidence as an acknowledgment of plaintiff's title, made in writing within the twenty years. It was held not to be sufficient for that purpose. It was then contended that it was evidence of the creation of a tenancy at will, and Martin, B., was of opinion that it had that effect. The other Judges held that, even if admissible as evidence against the defendant, which was questioned, it did not establish the tenancy. But there was no question that such a tenancy might be created as the effect of communications with one who was already wrongfully in possession.

In *Doe Stanway* v. *Rock*, 4 M. & G. 30, it was held that the question whether a tenancy at will had been created between one Mrs. Woolrich, under whom the defendant claimed, and a Mr. Foley, whose title the plaintiff was asserting, was properly left to the jury upon evidence of some communications between Mr. Foley and Mrs. Woolrich, the nature of whose possession, whether as a trespasser or under an undetermined tenancy at will, was not very well defined.

I think the two following propositions, which are

elementary in their character, are in accordance with principle and authority:

1. When one is in possession of the lands of another, not holding as his tenant, he may become tenant at will by an agreement that he shall hold them at the will of the lessor.

2. It is immaterial whether such possession may have been taken originally without colour of right, or under a tenancy at will which was afterwards determined. In either case its character, so far as the statute is concerned, is the same.

Then I found on my reading of the statute a third proposition, viz., that one entering as tenant at will ceases after a year to hold as tenant (unless he may be tenant at sufferance) in the contemplation of the statute.

And from these the conclusion follows that one in the position of the present plaintiff, who entered as tenant at will, ceased to hold the relation of tenant (except at sufferance) a year from his entry, and was in a position to re-establish the relation of landlord and tenant by whatever act would have that legal effect.

I think this result is substantially the same arrived at by the Court of Chancery in *Foster* v. *Emerson*, 5 Gr. 135. There is no doubt that the doctrines held by the very eminent Judges who decided that case, if applied in the terms in which they are enunciated in the judgments delivered to the facts and evidence before us, would be decisive in the defendant's favour. If we could hold so broadly as it appears to have been there laid down, that a tenancy at will is to be deemed to continue so long as the tenant acknowledges that that relationship exists, there would be an end to all questions here. I am not able to adopt that wider view, or perhaps it may be more correct to say I cannot concur in that mode of stating the effect of the statute. I think I am bound by the language employed, and on the grounds to which I have adverted, to hold that for the purposes of the statute the tenancy ended with the first year. I think that is also the view taken by the Court of Queen's Bench in *Doe Perry* v.

Henderson, 3 U. C. R. 486. But I am not sure that the Court in *Foster* v. *Emerson* really meant to decide anything substantially different from what I take to be the law, viz., that the tenancy at will may be renewed from time to time without any more express determination of the original tenancy than that which attends the operation of the statute.

I do not see my way to hold that a verbal acknowledgment of the title of the landlord, without more, will enable the landlord to contend that the right of entry under subsection seven did not accrue at the end of the first year. Such an acknowledgment of title must, I think, be in writing, under section thirteen. But if, in addition to the acknowledgment of title, there are dealings between the parties involving the admission by the occupant that he holds as tenant of the owner, or, in other words, that the owner is in possession by him as his tenant; or if there is any agreement, evidenced by words or acts, to hold at the will of the owner, I perceive no sound reason for refusing to hold that a fresh tenancy is thereby created. The evidence in support of such an agreement may be more or less direct, varying from an express promise to what is spoken of in *Foster* v. *Emerson*, 5 Gr. 135, by some of the Judges, referring to the decision of the Court of Queen's Bench in England, in *Doe Groves* v. *Groves*, 10 Q. B. 486, as circumstances evincing a friendly understanding between the parties respecting the land. But the necessary concurrence of the minds or wills of both parties may, in my judgment, be shewn. I venture to think that this was really the extent to which the decision in *Foster* v. *Emerson* was intended to go. I find language used which seems to indicate that. I find the Chancellor speaking of the parties dealing with it as an existing tenancy. I find Esten, V.C., stating four points which he considers established by the decisions. No. 2 is, that the tenancy may be shewn to have continued beyond the end of a year after its commencement, by evidence of any facts or circumstances indicating a good understanding between the parties

relative to the land; and No. 3, that any fact evidencing the existence of a tenancy at-will within twenty years before the commencement of the action will be an answer; and I find the present Chancellor, then V. C. Spragge, stating his view that each time a tenancy-at-will is shewn to be existing, that is, for the purposes of the statute, the commencement of the tenancy.

If this construction is correct, and no substantive determination has to be shewn, I am prepared to agree with Mr. Justice Galt, that a new tenancy-at-will was shewn to have been created between the plaintiff and his father. There was, I think, an express acknowledgment by the plaintiff that he held the land under his father. The evidence given by the plaintiff differs from that given by the defendant, touching the transaction in 1871 in which they were the chief actors; and that of Mr. Clark does not quite agree with either of them. But I think any one of the versions is sufficient. The defendant was there on behalf of the father upon business which involved not merely the assertion and concession of the fact that the father owned the land, but also the further fact that the plaintiff was occupying it with his permission; and all that took place between them bore out the same thing. But that is not the whole evidence which touches the point of a renewal of the tenancy within eleven years. There is the plaintiff's own account of his periodical visits to his father, and the visits of his wife; his accounting to his father respecting everything he was doing; the remonstrances, directions, and permissions, concerning the cutting of timber; and such evidence of the general understanding with his father, as well as the personal communications, forming, in my opinion, a stronger body of evidence to prove the creation of a tenancy-at-will, (of course on the hypothesis that the original tenancy had ceased,) than that upon which several of the English cases were decided.

There is still the other aspect of the case, namely, that the plaintiff was never tenant-at-will, but only caretaker.

I agree with Mr. Justice Galt, that there is strong

evidence in support of the finding of the learned Chief Justice at the trial. One circumstance which was relied on against it was that the plaintiff had the beneficial use of the land. That, however, I do not take to be conclusive. The use of the land may be the remuneration for taking care of it, or for performing other services.

In the report of *Allen* v. *England*, 3 F. & F. 49, we have a note of the ruling of Erle, C. J., at *nisi prius* upon facts fitted to raise a question of this kind. But notwithstanding the respect with which the opinions of that eminent Judge must always be received, it would he perhaps unfair to rely on this report as furnishing a decision sufficiently definite to be followed as an authority; particularly as, although a rule was moved and refused in *banc*, we have no report of the proceedings there. Yet the case may be usefully referred to in connection with observations made upon it by the reporters and by text writers, as bearing both on the questions of caretaker and tenant at will. Allen, the plaintiff, was the occupant of the land; one Cox was the owner, and the defendant claimed under him. Cox deposed that the plaintiff had asked him to let him keep boys out of the land, and that he had consented to his having the use of it so long as he did so; and that every year or two he used to visit the land, go on it with the plaintiff, and frequently tell him what trees to lop and cut, and what fences required repairs. This was denied by the plaintiff. Erle, C.J., in charging the jury said, at p. 52: "It may be taken that the plaintiff had the beneficial occupation for more than twenty years, and if that will give him a title, I will give him leave to move. But, in my judgment, every time Cox put his foot on the land it was so far in his possession that the statute would begin to run from the time when he was last upon it. The question then for the jury will be whether they believe the evidence of Cox that he gave the plaintiff leave to use the land on account of his taking care of it, and that he often went upon the land and gave directions as to cutting trees, &c. If so they ought to find for the defendant." The

jury said they believed the evidence of Cox; and accordingly on the above direction found a verdict for defendant, against which the plaintiff's counsel moved in the following term in the Common Pleas, but took nothing. In a note to the case, the learned reporters refer to several of the decisions on the subject of tenancies at will, and suggest that the safer ground on which to support the ruling of Erle, C. J., is that there was no tenancy in the plaintiff, but merely an occupation as bailiff for the owner Cox, looking after the land for him and on his behalf. The case is commented on in Darby and Bosanquet's treatise on the Statute of Limitations, and it is there said, at p. 265: "It may perhaps be thought that Erle, C, J., went almost too far in his ruling; because the acts of ownership exercised by the defendant may be considered as consistent with the plaintiff's possession, and hardly to bring the case within the principle of *Randall* v. *Stevens*. But even if this be so it would seem quite clear that the verdict was right, because the acts of ownership were clearly such as to determine the tenancy at will, and it may be fairly inferred from the plaintiff being allowed to remain in possession as before, that a new tenancy at will was created every time the defendant left."

I am satisfied, as Mr. Justice Galt was in the Court below, to adopt the summary made by Mr. Justice Gwynne of the facts in support of the finding at the trial, respecting the plaintiff's position as caretaker. After referring to some of the evidence in detail, the learned Judge continued thus, at p. 467: "There is much in the above evidence, as it appears to me, in support of this finding. The plaintiff's own account that he was authorized by his father to take timber for his own use, and to cut down timber to pay the taxes upon the block, and his account of his habit every time he would go down to his father, that is every year or every second year, of telling him everything he was doing, what he chopped, and what he cleared, and the repeated injunction he received not to allow any stranger to take off any timber, seems to me to be very consistent

with what would be natural and likely to occur in the case of a steward, caretaker, or agent giving an account of his stewardship, which was compensated by his being allowed to live on the south fifty acres, and by using the cleared part of the land for the support of his family. I am not prepared to hold that a son might not occupy land as the steward or agent of his father under an arrangement of that description, and so that the Statute of Limitations should not begin to run against the father."

Upon the whole case, having regard to the express finding of the learned Chief Justice, which, although there may be room for a different conclusion, I do not think is unsupported by the evidence; to the superior advantages he had in having the witnesses before him; and to the views of the statute in its application to the question of the tenancy-at-will which I have discussed, the plaintiff has not, in my opinion, shewn it to be our duty to deprive the defendant of his verdict.

I therefore think the appeal should be dismissed.

MORRISON, J.A.—This is an appeal from a judgment of the Court of Common Pleas, discharging a rule *nisi* to set aside a verdict for the plaintiff. The action is one of trespass, for breaking, and entering, &c., upon the north half of number one, in the thirteenth concession of the township of Wellesley, in the county of Waterloo. The action was commenced on the 4th of March, 1878. Both plaintiff and defendant were examined at considerable length at the trial before the learned Chief Justice of the Queen's Bench, who tried the case without a jury.

It appeared that the plaintiff and defendant were sons of one Thomas Ryan, who was the owner in fee of four hundred acres in Wellesley, composed of lots one in the thirteenth and fourteenth concessions of that township; that the father lived in the township of Tecumseth, in the county of Simcoe, many miles distant from Wellesley; that in September, 1849, with a view of settling his son, we may assume, the plaintiff, his father, proposed to him to

take his choice of one hundred acres of the four hundred; that the plaintiff selected the south half of No. 13, in the 12th concession, and during the same year, 1849, the plaintiff, with his family, left Tecumseth and took possession of such south half: that he cleared a portion of it, living on it and cultivating it until the year 1864. It appeared also, that in 1849, when his father gave him the one hundred acres, it was understood that the plaintiff was to take care of the remaining three hundred acres, to see that no timber was cut or taken off the same, the plaintiff being at liberty, and he had permission, to cut timber on any part of it for his own use: that while the plaintiff was living on his own place, the father sent him money to clear a portion of the adjoining north half of number one—the land now in dispute; that the plaintiff accordingly cleared some fifteen acres on the south half of the north half, and the plaintiff, in 1863, let the whole of the north half of 13, including the cleared portion, to one Richardson, who, in lieu of rent, was to do certain clearing on the lot. Richardson built a house on it, and occupied the place until 1864, when some difficulty arising, on account of Richardson selling timber off the lot, plaintiff's father came to Wellesley and he told plaintiff that he had no right to put Richardson on the lot, and having done so he would have to get him off it; that Richardson soon after left the premises. That in 1864 the plaintiff sold the south half of 13, which his father conveyed to him, to one Kennedy, and he afterwards wrote to his father to say that he was going to move on to the north half of 13, the premises in dispute. That in December, 1864, the plaintiff and his family moved into the house built by Richardson on such half lot; and in January, 1865, he received a letter from his father, dated the 14th of January, in which the father says: "I will send you thirty dollars to pay the taxes, and it is the last taxes I will pay on it till I see further; as for you, you may whistle when you get a lot as handy as you got this last one." That since December, 1864, the plaintiff with his family continuously resided on and occupied the

half lot until this action; the plaintiff erecting buildings, clearing every year portions of the land and along the whole front of the lot, and fencing the same in; cultivating the cleared portions, cutting timber on it, and exercising other acts of ownership; the lot being assessed in the plaintiff's name since 1865, and the taxes paid by the plaintiff. It appeared, also, that the plaintiff, since 1864, occasionally visited his father in Tecumseth, and on such occasions would tell him what he was doing on the half lot, what improvements he had made from time to time.

It appears by the defendant's testimony, that he was sent by his father, about the year 1871, to see plaintiff, because his father was informed that the plaintiff was cutting timber and destroying the land, (upon what lot does not appear,) and to tell him to stop cutting; and that if he would not pay the taxes he would give it to some one else: that the plaintiff said he would not destroy any more timber, and that he would pay the taxes if he was left on the place until such time as they would want it. This latter statement is denied by the plaintiff.

The evidence of the defendant is most unsatisfactory, and is contradicted in material points by the plaintiff's testimony, and most of it is quite irrelevant to the question in issue. The interview to which the defendant refers in 1871 did not take place on the premises in dispute, but apparently on lot fourteen; and his evidence is so general and uncertain that it is almost impossible to say what lot, or portion of the three hundred acres, the principal part of his evidence relates to. As to the non-payment of taxes, it must necessarily relate to the other two hundred acres in the fourteenth concession, as the plaintiff was assessed for and paid the taxes on lot thirteen from the year 1865. According to the defendant's testimony, the plaintiff was a trespasser on the lot in question from his first occupation of it, which is quite inconsistent with the facts appearing in the case.

The father died on the 29th of March, 1877, and by his will, dated the 26th of March, 1877, he devised the south

half of the north half of the one hundred acres in question to the plaintiff, and the north quarter of the same to the defendant. And the object of this appeal is to establish the right of the appellant to the north fifty acres, which he claims by possession; as to the south fifty acres, he takes that under his father's will.

It was conceded, during the argument, that prior to December, 1864, the plaintiff did not claim, nor was he in possession of, the premises in dispute; but from that time forward it is, I think, indisputably clear from the evidence that he was in possession of the premises continuously up to the time of the bringing of this action, the 4th of March, 1878,—a period of over thirteen years; and that upon the ground of possession he is entitled to our judgment, unless we can see that the evidence discloses an interruption of the plaintiff's possession during that period.

The learned Chief Justice, who tried the cause, gave no decided opinion at the trial upon the effect of plaintiff's occupation. The only fact found by the learned Chief Justice is, that the plaintiff did not occupy or claim the half lot as his own against his father, but merely as acting for him; living on the south fifty acres, and using the north fifty acres, clearing some of it, taking timber off some part, and protecting it. But it seems to me that the case clearly shews that the plaintiff entered upon the lot in December, 1864, first notifying his father of his intention to do so: that during the plaintiff's occupation he erected buildings, and from time to time improved portions of the half lot, clearing and fencing along the whole front of the one hundred acres; had it assessed in his own name and paid the taxes; cultivating and taking to his own use the crops and profits, and exercising various other acts of ownership—an occupation and acts quite inconsistent with the character or duties of an agent or caretaker. After a thorough examination of the evidence, the conclusion I have arrived at is, that the plaintiff's position, when he entered into possession of the land in question, in 1864, was that of a tenant-at-will to his father.—As said

by Parke, B., in *Ball* v. *Cullimore*, 2 C. M. & R. 124, he had nothing more than a lawful possession, and must be considered as having that kind of legal title which in law is recognized as a tenancy-at-will—that since then the plaintiff has been in the actual and continued possession of the fifty acres in dispute, improving and cultivating the premises, &c., as I have already stated: that such tenancy-at-will, by force of the statute, for the purpose of calculating the time of limitation expired at the end of the first year, in December, 1865, at which time the father's right of entry accrued; and that the title of the father, under whom the defendant claims the fifty acres in question, as devisee, was therefore barred at the time of his death, in 1877.

It was, however, argued on the part of the defendant, that during the period of limitation, viz., in 1871, at the time when the defendant saw the plaintiff at the instance of his father, and complained of the cutting and carrying away timber, &c., there was an interruption of the plaintiff's possession, on the ground that what took place between the brothers on that occasion created a new tenancy-at-will, and that consequently the father's right of entry then commenced. I cannot take that view of the evidence, nor do I think that such was the intention of the parties. I fully agree in the conclusion arrived at by the learned Chief Justice of the Common Pleas upon this part of the case; for after a careful consideration of the evidence, and giving to the defendant the full benefit of his own testimony, I see no sufficient evidence to warrant us in holding that there was anything done on the part of the plaintiff, or the defendant, as agent of his father, that indicated a dispossession of the plaintiff, or from which we can say, as a matter of fact, that any change took place in the plaintiff's occupation, or that the then existing holding of the plaintiff, as a tenant-at-will, was either expressly or impliedly put an end to or determined; or that, under some fresh agreement, a new tenancy-at-will was created. Nor do I see any evidence to justify me in

thinking that the plaintiff or his father contemplated any such thing.

What took place on the occasion referred to was, in my opinion. a mere remonstrance or complaint, on the part of the defendant, that the plaintiff was cutting, or allowing timber to be cut, and disposing of it, (of what portion of the three hundred acres does not clearly appear,) and that although he did so he had not paid the taxes. This latter complaint must have referred to the taxes on the two hundred acres in the fourteenth concession, as the plaintiff had regularly paid the taxes on the land in question. And the fair inference from the evidence is, that the cutting of timber, &c., complained of was on the two hundred acres, and not on the half lot in question. I therefore fully concur in the opinion expressed by the learned Chief Justice of the Common Pleas, that the circumstances attending the interview between the plaintiff and the defendant, in 1871, did not constitute a new *terminus à quo.*

As to the operation of the clauses of the statute bearing on this case, the result of the authorities appears to me to shew, that where a person enters into possession of land as a tenant-at-will, and has remained in continuous possession beyond the statutory period of limitation, and claims title to the land by length of possession, such tenancy will be determined at the end of the first year; and that a continuous possession by such tenant, paying no rent, for twenty-one years (now eleven) from the creation of the tenancy-at-will, extinguishes the title of the owner; in other words, the tenancy-at-will will be determined for the purposes of the statute at the end of the first year, at which time the right of entry will accrue. And it seems to me that the statutable determination of the tenancy, at the end of the first year, can only be invoked and take effect when the question in issue in litigation between the parties would be, whether the tenant-at-will had been in possession for eleven years, or where it was contended that the parties themselves had determined the original tenancy-

at-will at a period within the eleven years, so that a new right of entry had accrued, which would defeat the tenant's alleged claim by possession. The statute leaving, for all other purposes, the tenancy-at-will within the period of limitation as between the parties to still exist, so that they might determine the tenancy at any time within the eleven years, and the owner resume possession; and if a fresh tenancy-at-will between the parties is created within that period, a new right of entry accrues, and the period of limitation for the purposes of the statute would then commence to run from the end of the first year of such new tenancy.

As said by Lord St. Leonards, in his work on the statutes relating to property, in commenting upon the case of *Randall* v. *Stevens*, 2nd ed., p. 57: "It was difficult to contend that, universally, every tenancy-at-will should be deemed to have expired by operation of law at the expiration of one year after its commencement, and the more reasonable construction to put on the enactment might have been, that when there has been no actual determination of the tenancy by the act of the parties within twenty-one years, it shall be deemed to have determined at the expiration of the first year, making an occupation of twenty-one years without payment of rent a bar; but where there has been an actual determination of the tenancy within that period, whereby a new right of entry accrues, the clause of the statute shall have no operation, 'such tenancy' being supposed by the statute to continue till the right of entry is barred."

I do not think it necessary, for the disposing of this case, to discuss at length the effect of the various decisions cited during the argument. I will only refer to the cases of *Locke* v. *Matthews*, and *Day* v. *Day*, decisions, in many respects, applicable to the case under judgment. In *Locke* v. *Matthews*, 13 C. B. N. S. 753, Erle, C. J., (at p. 761) in delivering judgment, says: "In ordinary cases, an estate-at-will is effectually put an end to by a clear expression of the determination of the will; but this statute

requires some more decided act on the part of the owner of the land, to prevent the acquisition of a title by one who remains in possession." * * The object of the statute, and a very beneficial one, is to prevent the bringing up of dormant titles, after many years have been allowed to elapse. It requires that persons who have rights shall enforce them within certain limited periods." And his Lordship, after referring to the clauses of the statute, says, at p. 762: "Therefore, after twenty-one years from the commencement of the tenancy-at-will, the title of the real owner is absolutely barred or extinguished, unless such title is preserved to him by some of the other provisions of the statute." * * At p. 763: "If a new tenancy-at-will is created, the twenty years are to begin to run from the period at which such new tenancy commenced. The statute has, no doubt, been careful to prevent persons who have enjoyed a long, uninterrupted possession of lands, from being turned out upon frivolous pretexts; for the tenth section enacts, that no person shall be deeemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon."

The case of *Day* v. *Day*, L. R. P. 3 C. A. 751, is a strong authority in favour of the plaintiff. That was an appeal from the decision of the Supreme Court of New South Wales. The Chief Justice of the Supreme Court held, that in the case of tenancies-at-will, the right of entry accrues after the determination of the tenancy-at-will within the first year; and if not so determined at the end of such year, that the operation of the statute having so begun to run, could only be stopped by the creation of a fresh tenancy other than a tenancy by sufferance. The Privy Council held that the tenancy-at-will under which the occupation began must, for the purposes of the bar of the statute, be deemed to have been determined at the end of the first year. And their Lordships said, (at p. 761): "When the statute has once begun to run, it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the pro-

perty, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will." Also, at p. 762: "Assuming that there was a determination of the tenancy, and that the occupation of Thomas, the son, continued without interruption, to the knowledge and with the sanction of Thomas, the father, this would constitute an occupation at sufferance, to all intents, and as far as related to the purposes of the statutory bar, no alteration would be made in the status of Thomas, the son. The right of entry created by the seventh section of the statute was not thereby waived, suspended, or extinguished; there was no re-vesting of possession; the running of the statute was in nowise impeded." And after stating there was no evidence of a fresh tenancy, the judgment proceeded (at p. 763): "The language and policy of the statute require, that to constitute this new *terminus à quo*, the agreement for a new tenancy should be made by the parties, with a knowledge of the determination of a former tenancy, and with an intention to create a fresh tenancy-at-will."

In whatever view we may consider the case before us, the result hinges upon the following points: First—Was the plaintiff, when he entered into possession of the land in question, in 1864, a tenant-at-will to his father? Of this, I think, there can be little doubt. That being so: secondly, it lay on the defendant to shew that such tenancy was determined and put an end to during the period of limitation; and, thirdly, that a fresh tenancy-at-will was created. In my opinion, the defendant has failed to establish either of these two latter points. I am, therefore, of opinion that this appeal should be allowed, and that the rule *nisi* in the Court below should be made absolute to enter a verdict for the plaintiff.

The only other question is, for what amount of damages the verdict should be entered. The evidence as to damages

is meagre, and little attention appears to have been given at the trial to this part of the case, the action being brought principally to try the right to the fifty acres. The plaintiff is not entitled to much consideration. I think the verdict should be entered for $10 damages.

Appeal allowed.

FITZGERALD ET AL. V. THE GRAND TRUNK RAILWAY COMPANY.

R. W. Co.—Agreement—Additional parol term—Conditions—"At owner's risk"—Liability for negligence.

The plaintiffs sued the defendants for breach of a contract to carry a quantity of petroleum in covered cars from London to Halifax, alleging that they so negligently carried the same that it was exposed to the weather and destroyed. It appeared that the plaintiffs had a large quantity of oil to send, and agreed verbally with the defendants' agent at London for its carriage, and that it should go in covered cars. The first cargo was shipped on a request note signed by the plaintiffs, and a corresponding receipt signed by the defendants, by which they undertook to carry it subject to the terms and conditions endorsed, one of which was, that "oil will under no circumstances be carried save at the risk of the owners." Nothing was said in the receipt about covered cars, and the oil was carried in open cars, in consequence of which a large quantity was lost.

Held, that, even if the verbal evidence was admissible to prove a contract to carry in covered cars, the defendants were not liable thereon, as the agent had no authority to make such a contract; but, *Held*, also, affirming the judgment of the Common Pleas, 28 C. P. 586, that they were guilty of negligence, liability for which the condition did not exempt them; and that the declaration could be amended accordingly.

Held, also, that the company might, by a condition properly framed, have exempted themselves from liability for such negligence.

Per MOSS, C. J. A., the verbal evidence was admissible, as the nature of the transaction shewed that the parties did not intend the documents to contain the whole contract.

Per BURTON, J.A., it was inadmissible, as there was no sufficient evidence to shew that the parties did not so intend.

Remarks upon the term "gross negligence."

This was an appeal from a judgment of the Court of Common Pleas discharging a rule *nisi* for a nonsuit, or to

enter a verdict for the defendants, reported in 28 C. P. 586. The pleadings and facts are fully stated there, and in the judgments in appeal.

The case was argued on the 15th of May, 1879 (*a*).

McMichael, Q. C., and *Bethune*, Q. C., for the appellants. The goods, for damage to which this action is brought, were carried under a special contract reduced to writing, and no evidence of parol promises previously made can be added to or used to vary the written contract. There are not two independent contracts, as in the case of *Malpas* v. *London and South Western R. W. Co.*, L. R. 1 C. P. 336, one to carry to a certain place written, and the other verbal to carry on to another place. The contract to carry is in writing, and covers the whole distance, and the mode of carrying, if not contained in the written contract, cannot be introduced and embodied by verbal statements to make the contract more minute, and introduce stipulations not expressed nor intended to be expressed. Besides, the agent Thorpe had no power to bind the appellants by verbal promises. The printed contracts supplied to him shewed his instructions, and the extent of his authority; and the respondents, who had been supplied with such forms and knew their contents, had full notice that his authority was limited, and in what manner he could bind the appellants. Any verbal promises made by him outside of the writing he was authorized to sign were simply his personal undertakings and statements that he would procure such carriages for them if he could, and were not intended to bind and ought not to bind the appellants. But even if the written contract is of any avail, it required notice of the loss to be given to the company, and the learned Judge was wrong in finding that Black was not an agent to whom notice should be given. However if the respondent were not bound to give notice to the agent at Halifax, then they were bound to give notice in writing to

(*a*) *Present.*—Moss, C.J.A. Burton, Patterson, and Morrison, JJ.A.

the station agent at Portland, where the appellants' line terminated. The clause number four in the special conditions, providing that oil shall not be carried at all except at the risk of the owner, would be of no avail if previous verbal promises of the station agent override it. Under it the company were not bound to take special care of the oil, and provide cars of a particular character for its carriage, and the omission to do so is not an act of negligence under the written contract. It is argued by the respondents that under the case of *D'Arc* v. *The London and North Western R. W. Co.*, L. R. 9 C. P. 325, the appellants are responsible because they broke the special contract, but we contend that under the terms of the written contract, the only one they entered into, they were not bound to carry the oil in covered cars, and that when they made it part of the contract that oil should not be carried at all except at the risk of the owner, they stipulated for exemption from the exact liability now sought to be imposed upon them—that is to say, liability for not having used special carriages in the conveyance of the oil; and that their not doing so cannot, under the terms of the contract, be deemed negligence. They were not bound to use more care than they would use in the carriage of ordinary merchandise, nor were they bound to use a particular class of cars. They had no duty cast upon them to carry oil, and they only consented to do so if they were free from liability in case anything went wrong in its carriage, in consequence of an omission to do that which in the carriage of ordinary merchandise they were not required to do. Any negligence charged against them must be such acts as would be negligence in ordinary cases, and not acts or omissions which become negligence because of the peculiar commodity carried. The contract provided that such acts shall not be called negligence. But in reality the case of *Peek* v. *North Stafford R. W. Co.*, 10 H. L. 473, and the judgment of Blackburn, J., shewing what the law was in England before the passing of the Acts requiring conditions to be reasonable, is an authority as to what the law now is.

That case has been followed in this country by *Hamilton* v. *Grand Trunk R. W. Co.*, 23 U. C. R. 600, and shews that the company are exempted from liability even when the loss is caused by gross negligence of them or their servants. The cases of *D'Arc* v. *The London and North Western R. W. Co.*, L. R. 9 C. P. 325, and *Robinson* v. *Great Western Railway*, 35 L. J. C. P. 123, are exceptional cases, in which the law laid down by the Judges in *Peck* v. *North Stafford R. W. Co.*, is admitted; but they held that the words "at owner's risk," nothing having been said about delay, did not exempt the railway company from liability for injuries caused by delay. But in this declaration no complaint is made of delay, and in this contract liability for delays is especially provided against. None of the cases have yet decided that injury arising from negligence in the management of the goods while in transit, will make the company liable if a contract has been signed by the owner taking the risk upon himself. The parol agreement insisted upon by the respondents contradicts the written agreement afterwards signed. In the written one the respondents agree that if the appellant carry oil, it shall be at the owner's risk. If the contract is read with the parol contract imported into it, one part of the contract contradicts the other. If there are two independent contracts one of them must prevail, and if the respondents succeed the written contract is set aside. They cited *Simons* v. *Great Western R. W. Co.*, 18 C. B. 805; *Aldridge* v. *Great Western R. W. Co.*, 15 C. B. N. S. 582; *Carr* v. *Lancashire and York R. W. Co.*, 7 Ex. 707; *Harrison* v. *London and Brighton R. W. Co.*, 2 B. & S. 122; *Lewis* v. *Great Western R. W. Co.*, L. R. 3 Q. B. D. 195; *Parsons* v. *Queen Ins. Co.*, 29 C. P. 188; *Sayward* v. *Stevens*, 3 Gray 97; *Shaw* v. *Gardner*, 12 Gray, 488; *May* v. *Babcock*, 4 Ham 334; *White* v. *Vankirk*, 25 Barb. 16; *Edwards* v. *Aberayron, &c., Ins. Co.*, L. R. 1 Q. B. D. 575; *Scarlett* v. *Great Western R. W. Co.*, 41 U. C. R. 214; *McCawley* v. *Furness R. W. Co.*, L. R. 8 Q. B. 57; *The York, &c., R. W. Co.* v. *Crisp*, 14 C. B. 527; *Hughes* v.

Great Western R. W. Co., 14 C. B. 637; *Austin* v. *Manchester R. W. Co.*, 16 Q. B. 600; *Shaw* v. *York, &c., R. W. Co.*, 13 Q. B. 347; *Re Delaware*, 14 Wall. 579.

Glass, Q. C., and *Fitzgerald*, for the respondents. The contract sued on and set out in the declaration was a contract to carry the goods in covered cars or conveyances, and the carrying of the goods in open or flat cars was a breach of that contract, and renders the appellants liable for any damages sustained by the respondents; and the appellants cannot be allowed to say that if they had not broken their agreement the damage might have occurred. There were two separate and distinct contracts, the one a verbal contract to carry the goods in covered cars or conveyances, together with other provisions distinctly specified at the time of making the same, and the other a written contract to carry the goods without specifying the method of carriage as well as other ingredients. The verbal contract was not merged in the written contract, and parol evidence of the verbal contract was properly admitted: *Malpas* v. *London and South-Western R. W. Co.*, L. R. 1 C. P. 336. Independently of and apart from any verbal contract or agreement to carry the goods in covered cars, it was the duty of the appellants, considering the nature and quality of the goods and the season of the year when they were to be carried, to have carried them in covered cars or conveyances, and the appellants were told by the respondents, when the goods were delivered to them for carriage, that unless they would undertake to carry them in covered cars, the goods would not be delivered to them for carriage, as the respondents could have the goods carried in covered cars by the Great Western Railway, whereupon the appellants agreed to carry the goods in covered cars, and this express stipulation or agreement was the chief consideration inducing the respondents to enter into the written contract. Without this express consideration and agreement the respondents never would have entered into the written contract, and the verbal contract may be imported into and read as part of the written contract, as it only

expresses verbally a condition which, by the written contract, the appellants were bound to observe The fact that by the written contract the goods were to be carried at the owners' risk, makes no difference, as that part of the written contract may be read with the verbal contract attached to it thus: "At the risk of the owner, but in covered cars only," The respondents contend further that if the goods were to be at the owner's risk it was only when the appellants were legally carrying them, not when they were grossly neglecting to carry them, and leaving the goods exposed to certain destruction by the heat of the sun and exposure to the weather. The written contract set up and relied on by the appellants is not a complete contract, as it does not mention the rate of freight to be charged by the appellants, which is a necessary part of the agreement, unless the appellants were to carry the goods free of charge, which is not contended, and the admission of parol evidence to shew that the goods were to be carried in covered cars in no way differs from the admission of parol evidence to shew the rate of freight to be charged. It is not pretended that such evidence would not be admissible in an action by the appellants for the freight, or in an action by the respondents for the recovery of money overcharged as freight, and paid to the appellants under protest. The verbal contract and agreement relied on by the respondents, was separate and distinct from the written contract relied on by the appellants; the verbal contract was a distinct and complete contract in every respect, stating the mode of carriage, viz., in covered cars, and the rate of freight to be charged for the through journey, the place of shipment and of destination, and that the goods should be carried with all possible expedition, which was a complete and ample contract without any supplemental memorandum in writing; it was not reduced to writing, and was not either by the appellants or respondents intended to be reduced to writing, or in any way incorporated in, or affected by the written memorandum afterwards drawn up and signed. This was such a contract as

was not necessary to be reduced to writing, and was such a contract as a general agent had full power and authority in the scope of his business to enter into and to bind his principals for the fulfilment of. The evidence shews that Thorpe was the appellants' general agent, and that he had authority to make special contracts for the carriage of freight, and to fix the rate of freightage, charges, and the terms of carriage; and the evidence further shews that the verbal contract entered into by Thorpe was also confirmed by Mr. Brydges, the manager, and Mr. Spicer, the superintendent of the appellants, so that if there had any want' of authority in Thorpe such want was avoided and the contract agreed to and confirmed by both Brydges and Spicer, the chief officers of the appellants. But the appellants cannot rely on the want of authority in the general agent, Thorpe, for the evidence clearly shewed that in competing for freight at London it was his common practice to make specific rates and conditions for his principals. The evidence also shews that Black was not a station freight agent. Moreover, the charter of the appellants does not authorize them to build a line of railway to Halifax, and without this they could not have a station freight agent, to whom notice of loss could have been given within twenty-four hours; and not having a station freight agent at Halifax to whom notice could have been given, the appellants cannot avail themselves of the condition in the written contract relied on by them, that notice of the loss should be given to the appellants' station freight agent within twenty-four hours after the delivery of the goods. Nor were the respondents, under this condition, bound to give such notice at Portland, as the carriage was not complete there, and the goods were not delivered at Portland to the respondents or their agents, who could have ascertained the loss and given the notice for them; but, on the contrary, the possession of the goods at Portland was retained by the appellants, and the respondents were no more bound to give such notice at Portland than they were at Montreal, or any other place. In addition to

this, the distance from Halifax, where the goods were delivered, to Portland is such that it would be impossible for the respondents to give notice at Portland in writing of the loss or damage sustained within twenty-four hours of the delivery of the goods at Halifax, and the appellants cannot construe the condition in such a manner as to render compliance with it impossible. Clause number four in the special conditions relied on by the appellants, only binds the respondents to assume and bear the risks ordinarily incurred in the carriage of goods of the class specified in the condition, and does not excuse the appellants from wilful negligence or misconduct, nor does it operate so as to excuse them from wilful destruction of property delivered to them for carriage, by exposing it in such a manner as to render its destruction inevitable, as the appellants did in this case, it being shewn by the evidence that goods of the class and quality in dispute here could not be safely carried in open or flat cars at the season of the year when these goods were carried. Nor does this condition release them from the consequence of the breach of their special contract to carry in covered cars: *D'Arc* v. *London and North-Western Railway Company*, L. R. 9 C. P. 325. It is submitted that the negligence charged against the appellants in this case would be negligence in the case of other goods commonly carried by them, and that notwithstanding this condition, in all cases where the appellants undertake the carriage of goods they are bound to carry them in such a way as to secure their safe carriage, and that this condition only excuses them from the ordinary risks of carriage, and not from any wilful default or malfeasance on their part, or from loss or damage caused by a breach of their contract to carry the goods in a particular manner. Under the direction or suggestion of the Court below in this case, 27 C. P. 528, the pleadings of both parties were amended, the special point raised by the respondents' special replication, added under the suggestion of the Court, being that the appellants disregarding their contract and agreement,

wrongfully, improperly, and wilfully, and against the will of the respondents, exposed the goods in open platform cars for divers long spaces of time, by which wilful misfeasance a great portion of the goods were lost. This is a specific claim both for the breach of contract to carry in covered cars and for the delay in carriage. If the contention of the appellants that they are protected from delay, however unreasonable, is allowed, they would be equally protected had the delay been for six months or even a longer period, and the respondents could not, after waiting a reasonable time, bring an action for the loss of the goods although there had been a total loss, or if the appellants had converted them to their own use or wilfully allowed some other person to do so. *Fitzgerald* v. *Great Western R. W. Co.*, 39 U. C. R. 525, decides that the effect of the condition is not such as is contended for by the appellants. They cited *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Lindley* v. *Lacey*, 17 C. B. N. S. 578; Assignees of *Forman* v. *Rickett*, 4 H. & N. 1.

January 26, 1880. MOSS, C. J. A.—The plaintiffs declare upon a contract by the defendants to carry in covered cars a quantity of petroleum. The defendants contend that the whole contract is contained in the shipping notes, which give no description of the kind of cars to be used in the transportation, but simply acknowledge the receipt of the property to be sent by the defendants, subject to the terms and conditions stated therein, and agreed to by the request notes contemporaneously delivered to the company. The Court of Common pleas held that parol testimony was admissible to prove an express agreement by the defendants to despatch the oil in covered cars. After much consideration I have arrived at the same conclusion, although perhaps on not precisely the same grounds.

I agree with the defendants' contention that the verbal agreement cannot properly be designated as collateral to that evidenced by the shipping notes. If that were the sole ground for tendering the evidence, I should be of

opinion that it ought to have been rejected in conformity with the principles acted upon by this Court in *Mason* v. *Scott*, 22 Gr. 592. But it appears to me that the evidence is receivable on the broad ground that the real contract is not contained, and was not intended to be expressed, in the shipping notes. They were not by the compact of the parties made the sole and authentic media of proof. If there had been a single cargo, the subject-matter of the bargain, it might have been reasonable to presume that the parties had expressed the whole of their intention in writing, and that they meant the documentary evidence to be the appropriate repository and memorial of their agreement. In that view, the conversations between the plaintiffs and the company's agent would be treated as mere negociations, and would be superseded by the writing. But here the state of facts was something entirely different. The plaintiffs having a contract with the Government to deliver a large quantity of oil at Halifax, made one bargain with the agent for its carriage. Although there was only a single agreement, it was known to both parties that there was more than one cargo, and it is quite clear that the proposition made by the plaintiff and accepted by the agent related to the whole quantity to be conveyed. It follows that when on the 6th May, 1873, the plaintiffs delivered, and the defendants received the first cargo, neither party can possibly have intended that the shipping note should be the sole medium of proving the contract. It was, under the special circumstances, a mere incident to the performance of the contract in the manner adopted by the defendants in the transaction of their business. I think it operated to make the conditions it expressed binding upon the plaintiffs, but it did not prevent them from proving that the agreement was that the whole quantity should be conveyed in covered cars.

The evidence is precise and positive to shew that the agreement extended to the whole quantity. For example, one witness proved that the agent spoke to him in the beginning of May about the contract. The agent told him

that he was going to get the government oil to go by the Grand Trunk, and that he had secured the freight. The agreement, the terms of which were stated by the witness in accordance with the plaintiffs' view, was, he says, applicable to both lots of oil—to the whole of the government oil. This is abundantly confirmed by the rest of the evidence. The plaintiffs, therefore, (to adopt the expression of Lord Selborne, in *Jervis* v. *Burridge*, L. R. 8 Ch. 360,) are not seeking to enforce any hybrid agreement compounded of the written instrument and some terms omitted therefrom, but a single bargain to which the writings are merely ancillary. The doctrine applicable to such cases is succinctly stated in *Harris* v. *Rickett*, 4 H. & N. 1, by the Lord Chief Baron. It is that the rule excluding the parol testimony only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement. But I desire carefully to guard against the supposition that I am lending any countenance to the notion that where the subject matter is a single cargo, or certain specified goods, and a request note and shipping receipt are exchanged, testimony can be received of the conversations that passed between the owner and the company's agent upon the subject. In that case it appears to me that the contract is embodied in the document, and that parol evidence is only admissible when it is brought under one of the recognized and established canons. This I take to be the plain result of the decision in *Harris* v. *Great Western R. W. Co.*, L. R. 12 Q. B. D. 515. The principles which are applicable seem to me to be felicitously stated in the judgment of the Supreme Court of the United States in *Re Delaware*, 14 Wall. 579. The point decided was, that inasmuch as a clear bill of lading, which is silent as to the mode of stowage, imports an agreement to stow under deck, parol evidence was inadmissible to establish an agreement to stow on deck. The Court said, at p. 60: "Beyond all doubt a bill of lading in the usual form is a receipt for the quantity of goods shipped, and a promise to transport and deliver the same as therein stipulated.

Receipts may be either a mere acknowledgment of payment or delivery, or they may also be a contract to do something. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it is merely *prima facie* evidence of the fact and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony; but in so far as it is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence." So in *White* v. *Vankirk*. 25 Barb. 16, where the bill of lading was silent as to the sailing course which the master should take, evidence of a parol agreement to take a particular route was excluded, the Court holding that in respect to the agreement to carry and deliver it was a contract to be construed like all other written contracts, according to the legal import of its terms. The same point was decided in *Curry* v. *Holly*, 14 Wend. 26, and in *May* v. *Babcock*, 4 Hammond 334. and other cases, which are entitled to great respect.

I desire, therefore, to put the admissibility of the evidence on the distinct ground, that from the nature of the transaction it is apparent that the parties did not intend the documents to be the record of the contract. Then, if its admission does not infringe upon any rule of law, the next question is, whether the agent had power to make such an agreement as the learned Judge found to have been proved. Upon that the learned Judge has not expressed any opinion, but I think it must be answered in the negative. The onus of establishing authority lay upon the plaintiffs, and on this branch of the controversy I think they have failed. Although Mr. Thorp, as passenger and freight agent at London, was no doubt invested with authority to bind the company to all engagements necessary and proper for the transaction of their ordinary business in that city, I think that the evidence shews that it was beyond the scope of his duty, his instructions and his general employment to agree without communication with or the sanction of his superiors, that there should be

covered cars at Stratford ready to receive the plaintiffs' oil. I am of opinion, therefore, that the verbal agreement did not bind the defendants, and as the counts in the declaration are all directed to a breach of the contract to furnish covered cars, the plaintiffs must fail, unless the record is amended.

Hence the next inquiry is, whether any amendment can improve the plaintiffs' position, and if so, whether it can properly be so made at this stage of the cause. The learned Judge was of opinion, first, that having regard to the nature of the commodity, the length of the journey and the season of the year, it was the defendants' duty to have sent it in covered carriages, even if there were no express contract to that effect, and, secondly, that, notwithstanding the printed conditions on the receipt, they were responsible for neglect in despatching it upon open platform cars. If that view be sustainable a very slight amendment will introduce that ground of complaint into the record. It will only be necessary to strike out from the second count the description of the cars which it is alleged the defendants agreed to furnish between London and Stratford, and between Stratford and Halifax, and you will have a perfectly good count complaining of the defendants' default in not taking care of the goods and safely and securely carrying them to their destination. [The learned Chief Justice here read the count* and explain-ed the nature of the change.] Indeed, it might well be contended that the words to be expunged are mere surplusage.

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* For that the defendants were carriers of goods for hire from London to Stratford in the Province of Ontario, and from Stratford, aforesaid, to Halifax in the Province of Nova Scotia, and the plaintiff delivered to the defendants, and the defendants received as such carriers, certain goods of the plaintiffs, to wit, a large quantity of refined petroleum or coal oil, (in barrels suitable for the purpose of carrying such oil,) to be by the defendants taken care of and safely and securely carried in common open or other cars or carriages from London to Stratford, aforesaid, and from Stratford, aforesaid, to Halifax, aforesaid, in covered cars, carriages, or other covered conveyances, and there delivered to William Hare for the plaintiffs; and the defendants agreed with the plaintiffs to take care of, and safely and securely to carry the said refined petroleum or coal oil in

Now, still assuming the correctness of the first proposition laid down by the learned Judge, I think it is clear upon the evidence that it was improper and unsafe to expose the oil in uncovered cars. It is incredible that any manufacturer would have seriously entertained a proposition to transport the article in such a manner, and it would therefore seem that *primâ facie* the adoption of that course, without the sanction of the plaintiffs, was a violation of defendants' duty as carriers. To prove this it is unnecessary to go beyond the candid statement of Mr. Spicer, the superintendent of the company, which irresistibly leads to the inference that covered cars were the only proper vehicles. It cannot be disputed that at the very least, if such cars were not used, the greatest possible precautions should have been adopted to protect the barrels from the effect of the summer heat. While, therefore, I hold strongly to the opinion that substantial amendments to pleadings should not be made at this late stage without the greatest caution and circumspection, indeed without a feeling of moral certainty that the other side cannot be unfairly prejudiced, I think that if we agree with the learned Judge's opinion upon the legal questions, this is a case in which we may properly exercise the power we possess. But, before authorizing such an amendment, we must consider whether it will help the plaintiffs. *Prima facie* the defendants were guilty of negligence in the mode of carriage they adopted, and that was the proximate cause of the plaintiffs' sustaining loss by the leakage, but

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the said barrels, in common open or other cars or carriages, from London to Stratford, aforesaid, and in covered cars, carriages, or other conveyances, from Stratford, aforesaid, to Halifax aforesaid, and there deliver the same for the plaintiffs, as aforesaid, within a reasonable time in that behalf for reward to the defendants, and a reasonable time for carrying and delivering the same, as aforesaid elapsed; yet the defendants did not take care of the said goods and safely and securely carry the same in common open or other cars or carriages from London to Stratford, aforesaid, and in covered cars, carriages, or other covered conveyances, from Stratford to Halifax, aforesaid, and there deliver the same for the plaintiffs, as aforesaid, but so negligently carried the same, that the said barrels were exposed to the sun and weather, and were broken, damaged and destroyed, and the said barrels were damaged and lost to the plaintiffs.

they rely for protection, and that formed the principal topic of discussion before us, upon the special conditions endorsed on the receipt, that oil and molasses will under no circumstances be carried save at the risk of the owners or parties by whom they are consigned.

In considering the authorities by which we must be guided, it is necessary to keep distinctly in mind that the defendants are not subject to any statutory restrictions upon the conditions they choose to impose. The question of the reasonableness or justice of any such conditions does not arise. The only question is, whether the actual condition does give them immunity, notwithstanding their negligence. We must therefore look for guidance to the rules established by binding authority in cases where the aid of the statute against unreasonable conditions could not be invoked. The cases in the books are extremely numerous, and I shall confine myself to those that seem to present the nearest features of resemblance to the present case.

In *Wyld* v. *Pickford,* 8 M & W. 443, the defendants sought to limit their liability by a notice that they would not be responsible for the loss of or damage done to such goods as the plaintiffs', unless they were insured according to the value, and paid for at the time of delivery to the defendants. In delivering judgment Parke, B., said, that the weight of authority seemed to be in favour of the doctrine that in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence. In commenting upon that decision, in his opinion delivered before the House of Lords in *Peek* v. *The North Staffordshire R. W. Co.,* 10 H.L., 473, Blackburn, J., observed, p. 479, that the judgment seemed to him to proceed upon the ground that the authorities bound the Court to put a construction upon the terms of the notice, that the carrier "would not be responsible for loss or damage," making them mean, would not be responsible for loss or damage unless caused

by negligence; that this certainly seemed to him not the natural meaning of the words or the sense in which they would be understood either by a carrier or his customers, and though the weight of authority might, at the time when that decision was pronounced, constrain one of the Courts below to put this forced meaning on the words, he thought the House of Lords would hardly even then have considered themselves bound to do so. He pointed out that in the subsequent case of *Hunter* v. *Dibbin*, 2 Q. B. 646, decided in 1842, this matter had to be considered, and that the decision of the Court was that the words in the Carriers' Act, which are the same as those in the plea in *Wyld* v. *Pickford*, 8 M. & W. 443, were to be understood in their natural sense, as exempting the carriers from liability arising from negligence as well as from accident. According to that very learned Judge, who was speaking twenty-one years afterwards, that decision had always been acquiesced in.

In *Shaw* v. *The York and North Midland R. W. Co.*, 13 Q. B. 347, the receipt given to the plaintiff for the amount paid for the conveyance of his horse, contained a note that the ticket was issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage (*however caused*) occurring to horses or carriages while travelling, or in loading or unloading. There was no room for question that the defendants were guilty of negligence, for the injury was occasioned by a defect in the train in which the horse was placed, and the attention of the defendants' servants had been directed to this source of danger. It was held, however, that the language of the memorandum absolved the defendants from liability. So in *Austin* v. *The Manchester R. W. Co.*, 16 Q. B. 600., where by the terms of the ticket the proprietor of the horses took upon himself all the risks of conveyance. Upon this case Blackburn, J., remarks that it, like the former, was decided on the form of the declaration, but it went far to shew that in the opinion of the Court of Queen's Bench no good declaration could have been proved.

In *Carr* v. *The Lancashire & Yorkshire R. W. Co.*, 7 Ex. 707, the ticket was issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage (*howsoever caused*) occurring to live stock. The jury found that the accident was occasioned by the gross negligence of the defendants, but the judgment was nevertheless arrested. Mr. Baron Parke said that the only question was, whether the defendants had protected themselves against loss arising from their negligence. His opinion was that by entering into this contract with reference to the subject-matter the owner had taken upon himself all risk of conveyance, and that the railway company were bound merely to find carriages and propelling power. He seems to lay stress upon the use of the words, *however caused.* Alderson, B., said, at p. 714: "The words used are, 'the owners undertaking all risk of conveyance whatsoever.' * * Here the parties in effect agree that the plaintiff and not the defendants shall be responsible for injury occasioned by gross negligence on the part of the defendants, and consequently the company are protected against liability of this description by virtue of the express words of this contract." Martin, B., thought that if the carrier had been desirous of preparing a contract for the express purpose of getting rid of his liability in respect of gross negligence, he could not have used more apt words than those set forth upon the face of the document. Platt, B., however, thought that the case of gross negligence was not pointed at by the ticket.

The case of *Austin* v. *Manchester, Sheffield, and Lincolnshire R. W. Co.* 16 Q. B. 600, was similarly decided, but special stress was laid upon the use of the words *however caused.* In delivering his opinion in the same case of *Peek* v. *North Stafforshire R. W. Co.*, Cockburn, C.J., said at p. 557: "Thus for instance in *Shaw* v. *The York and North Midland R. W. Co.*, 13 Q. B. 347; as also in *Austin* v. *The Manchester, Sheffield, and Lincolnshire R. W. Co.*, 16 Q. B. 330, the plaintiff's horses, and in *Chippendale* v. *The Lancashire and Yorkshire R. W. Co.*, 21 L. J. Q. B.

22, the plaintiff's cattle, had been injured by the negligence of the defendants' servants; yet, as in each of these cases the plaintiff had signed a memorandum that all risks of conveyance were to be borne by the owner, the defendants were held free from all liability."

In the principal case itself the condition was that the company should not be responsible for the loss or injury to any movables unless declared and insured according to their value. Upon this Lord Westbury, in moving the judgment of the House, said, p. 567: "Now if the present condition had been embodied in a contract between the company and the owner of the goods delivered to be carried by that company, the necessary effect of such a contract would be that it would exempt the company from responsibility for injury, however caused, including therefore gross negligence, and even fraud or dishonesty on the part of the servants of the company."

It must be conceded that at first sight it seems difficult to discover wherein the terms of that contract were stronger than those upon which the defendants here rely.

In the more recent case of *Allday* v. *Great Western R. W. Co.* 5 B. & S. 903, the condition was that the company should not be answerable for any consequences arising from detention or delay, or in relation to the conveying of the animals, *however caused.* In holding this to be unreasonable under the statute, Cockburn, C. J., seemed to have no doubt that if full effect were given to it, it would amount to absolute immunity from all injury arising from delay caused by their own negligence. Similar views were enunciated by our Court of Queen's Bench in *Hamilton* v. *Grand Trunk R. W. Co.*, 23 U. C. R. 600, where the authorities are elaborately reviewed by my predecessor in this Court. It thus appears to me that as the law applicable to this case is the same as governed the English Courts before the passing of the Railway and Canal Traffic Act, 1854, there is an overwhelming body of authority to shew that the carrier may, by conditions aptly framed, protect himself against the consequences of negligence. In the

United States the rule in some of the states is different. Their Courts seem to have held that upon grounds of policy the carrier should not be permitted to contract for immunity against his own negligence. But in others the general doctrine of the right of parties to make any contract they please is applied.

In the English cases, subsequent to 1855, the question of unreasonableness is the distinguishing feature, but I do not think that in one of them can be found any expression, which can even be strained into an expression of judicial doubt as to the establishment of the rule that independently of the statute the company may by a condition absolve itself from all liability for negligence.

There is no doubt that in many of the older cases, as *Duff* v. *Budd*, 3 B. & B. 177, *Garnett* v. *Willan*, 5 B. & A. 53, and *Butt* v. *Great Western R. W. Co.*, 11 C. B. 140, the Courts had refused to extend the protection afforded by a notice, where the carrier had been guilty of what was termed gross negligence; but by the series of decisions, to some of which I have referred, extending down to *Walker* v. *The York and North Midland R. W. Co.*, 2 E. & B. 750, this rule had been relaxed, and the consignors were held bound by special contracts which were wide enough to absolve the carrier from liability for negligence, misconduct, or, it is said, even fraud. It was to curtail the enormous powers which the railway companies, by reason of their practical monopoly, possessed of forcing such special contracts upon their customers that the Railway and Canal Traffic Act was passed. But in cases to which this Act does not extend, the Courts still recognize the right of the carrier to limit his liability by contract. For example, the rule is now acted upon in the case of passengers, as in *McCawley* v. *Furness R. W. Co.*, L. R. 8 Q. B. 57, where the plaintiff had received a free pass as a drover, one of the terms of which was that he should travel at his own risk; and in cases where the loss or damage has arisen upon a line over which the defendants made their contract to convey, but which does not belong to and is not worked by

the company, although connected with their line, as in *Zunz* v. *The South Eastern R. W. Co.*, L. R. 4 Q. B. 539.

The case of *Gallin* v. *The London and North Western R. W. Co.*, L. R. 10 Q. B. 212, was that of a passenger travelling upon a pass, and it is worth referring to for the purpose of noting the view that Blackburn, J., took of *Carr* v. *Lancashire and Yorkshire R. W. Co.*, 7 Ex. 707 which decision, he says, led to the passing of the Act. The passage to which I allude is the following, at p. 216: "In that case the horse was killed by the gross and culpable negligence of the driver of another train, a servant of the company, and if the horse had been the property of a stranger, or even if it had been trespassing on the railway and could not get out of the way of the coming train, the company would have been liable; yet the Court of Exchequer held that, as there was a stipulation in the contract of carriage that the horse should be carried at the risk of the person sending it, they must give judgment for the defendants, leaving it to the legislature, if they thought fit, to alter the law; an appeal which the legislature very soon answered by passing the Railway and Canal Traffic Act."

Great reliance was placed upon the decision in *D'Arc* v. *The London and North Western R. W. Co.*, L. R. 9 C. P. 325, but it did not profess to introduce any new principle. It proceeded solely upon the authority of the earlier judgment by the same Court, in *Robinson* v. *Great Western R. W. Co.*, 35 L. J. C. P. 123. Upon examining that case it will be perceived that the question of liability for negligent transport is only incidentally, if at all, touched The important passage for our present purpose is the following, at p. 127: "The contract of the railway company is to deliver the horses in a reasonable time at the owner's risk. Whatever may happen to them on the journey is to be at the owner's risk. But where the contract is to deliver within a reasonable time, there is a duty entirely distinct from the question of damage which may arise from accident on the journey. If a railway company are bound to carry horses in twenty-four hours

at the owner's risk, and the horses do not arrive accordingly, then, whether the horses are damaged or not, there is a breach of contract, for which the company are liable." It is true that this case recognizes a liability for the consequences of delay in violation of a contract to deliver at a certain or a reasonable time. The company's breach of duty in this respect is referred to by the learned Judge in his opinion, but it has not been made a ground of complaint in the declaration. The added replication introduces it in an incidental manner, but that can only be taken to be by way of answer to the pleas by which the defendants sought to meet the plaintiffs' charge of not conveying in covered cars. The delay in transport did not form a matter in issue, upon which the plaintiffs founded a right to recover. The verdict was not based upon that default, and I think that it would be quite out of the question to allow the plaintiffs now to amend so as to make that their substantive ground of action.

Before proceeding to consider the question of whether this condition is strongly enough worded to exclude liability for negligence, there is only one other point upon which I desire to remark. The attempt was made with great learning by the counsel for the plaintiffs to fix the defendants with liability on the ground that their negligence was gross in its character. It cannot be denied that there are judicial utterances to be found which seem to attribute a specially profound, if somewhat undefined, significance to negligence thus described. But the distinction between slight, ordinary, and gross negligence, as the foundation of liability, does not seem to rest upon any sound juridical basis. It was said by Rolfe, B., in *Wilson* v. *Butt*, 11 M. & W. 113, that gross negligence was the same thing as negligence with the addition of a vituperative epithet. In the early case of *Hinton* v. *Dibbin*, 2 Q. B. 646, at p. 661, Lord Denman observed p. 661: "When we find gross negligence made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should

have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists."

It had previously been remarked by Bayley B., in *Owen* v. *Barnett*, 2 Cr. & M. 354: "As for the case of what is called gross negligence, which throws upon the carrier the responsibility from which, but for that, he would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of misfeasance."

So in *Austin* v. *The Manchester, S. & L. R. W. Co.*, 16 Q. B. 600, already referred to, the learned Judge who delivered the opinion of the Court said: "The terms 'gross negligence' and 'culpable negligence' cannot alter the nature of the thing omitted, nor can they exaggerate such omission into an act of misfeasance or renunciation of the character in which they received the horses to be carried."

Similar expressions of opinion by other eminent Judges might be cited, but I content myself with adding a reference to the explanation given by Montague Smith, J., in *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600, that the use of the term "gross negligence" is only one way of stating that less care is required in some cases than in others, and that it is more correct and scientific to define the degrees of care than the degrees of negligence.

It is true that the observation of Lord Cranworth, in *Wilson* v. *Brett*, 11 M. & W. 113, while generally approved of, has not wholly escaped criticism. In *Giblin* v. *McMullen*, L. R. 2 P. C. 336, Lord Chelmsford observed, that from the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard*, Ld. Raym. 909, the term in question had been used, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon *gratuitous bailee.* But his Lordship clearly recognized the fact that the expression, if intended as a definition, wholly failed of its object, and based his reason for its retention in legal phraseology upon the ground, that as there is a frac-

tional difference between the degrees of negligence, for which different classes of *bailees* are responsible, the term may be usefully employed as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt and Sir William Jones. That the learned Judge considered the epithet as having no special value beyond supplying the lawyer with a convenient term, is apparent from the language which he subsequently used, p. 337: "In truth this difficulty is inherent in the nature of the subject, and although degrees of care are not definable, they are, with some approach to certainty, distinguishable; and in every case of this description, in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the Judge to distinguish, as well as they can, degrees of things which run more or less into each other." In the subsequent case of *Moffatt* v. *Bateman*, L. R. 3 P. C. 122, the same learned Judge, in using the term, cautiously observed that it is sufficiently descriptive of the degree of negligence which renders a person person performing a gratuitous service for another responsible.

The misapplication of the term is discussed in *Campbell's* Law of Negligence, p. 11, in a passage which received the consideration of Willes, J., in *Oppenheim* v. *White Lion Hotel Co.*, L. R. 6 C. P. 521.

I think that from these quotations it appears that the Courts are now resolved to ignore mere verbal distinctions between different degrees of negligence as defining the true measure of liability. The correct rule seems to be to pay regard to the degree of diligence which the situation assumed by a person demands, rather than to his carelessness. If much is required of him, a slip from the narrow path of duty may well be called slight negligence. If no more is due from him than the care which a prudent man bestows upon his own affairs, failure to give that degree of care may conveniently be termed ordinary negligence. If trifling care would suffice for the discharge of duty, and that is not given, there is no harm in calling it

gross negligence. But the substantial question always must be, whether that care has been exhibited which the special circumstances reasonably demand.

There remains the question upon which alone I entertain any real doubt, and that is whether the terms of the condition are sufficiently precise and strong to relieve the defendants from liability for their negligence. I think it may be assumed as a fundamental proposition that it must be construed most strongly against the company. The language is that which they have chosen. They have very large powers of practically compelling their customers in most cases to accept the limitations they choose to prescribe. If, therefore, there is such ambiguity in the words, and such a want of precision in the statement, that the condition is fairly susceptible of two interpretations, that should be adopted which is the more favourable to the consignor.

Again, it must be carefully borne in mind that at common law the carrier of goods was subject to serious responsibilities. He was not merely bound to exercise skill and diligence, but he was liable as an insurer. Against this liability he might wish to protect himself, and the Courts have shewn great readiness to sanction conditions by which he demanded larger remuneration, if he incurred this large risk. *A priori*, therefore, he might be expected to propose agreements which relieved him from the extraordinary responsibilities of an insurer; but we should scarcely anticipate that one who was contracting to carry with reasonable skill and diligence, should seek to annex a condition which allowed him to be as careless or as indolent as he pleased. It appears to me that this is the spirit in which Judges have approached the interpretation of such contracts. While obedience to sound rules of almost universal application to contracts has compelled them to concede the validity of conditions which impaired the obligation of diligence arising from the very nature of the service and the relation of the parties, there has been an undercurrent of feeling that their extension to conditions inconsistent with the principal contract, which implies

reasonable care, is scarcely in harmony with public policy. The Courts have yielded, but not without reluctance, and while yielding they have shewn a tendency to qualify and restrict the rule by their mode of interpreting the contract. In *Wells and Tucker* v. *The Steam Navigation Co.*, 4 Selden, 375, it is observed with a vigour, that may seem to savour of strong feeling, at p. 389: "It would require a man of a good deal of effrontery to ask another to insert in his contract for performing a service a clause permitting him to be negligent in its performance, and relieving him from all liability for the injuries which his gross negligence might occasion; and the man who would insert such a clause in the contract would be a fit subject for a committee to take charge of his person and property." The canon of interpretation which at least in earlier days would have been adopted by the Courts of England can easily be discovered. The text-writers and judges who were prepared to deny the validity of contracts excusing negligence would have applied very searching criticism to their terms, had their enforcement been compulsory. A couple of extracts taken almost at random, will suffice to prove this. In the "Doctor and Student," we find it written: "If the carrier should perchance refuse to carry the goods, unless promise were made unto him that he should not be charged for any misdemeanour that should be in him, the promise were void." And so strong was the view held by Lord Ellenborough on the subject that he is reported to have said in *Lyon* v. *Mells*, 5 East 428, at p. 438: "It is impossible without outraging common sense so to construe the notice as to make the carriers say, 'we will receive your goods, but will not be bound to take any care of them, and will not be answerable at all for any loss sustained by our own misconduct, be it ever so gross and injurious.'"

My examination of the modern cases has led me to the conclusion that in none of them has it been decided as a pure question of construction, that the use of the words "at owner's risk" frees the carrier from all liability for

negligence. General expressions and loose dicta may be adduced tending to shew that individual judges had that notion present to their minds, but the point has never, I think, been deliberately adjudged. As I have already had occasion to point out, where there were two rates, at one of which the carrier was willing to assume his full common law liability as insurer, and at the other of which he only undertook a limited responsibility, the courts have shewn a disposition to give an indulgent interpretation to conditions. It is this which distinguishes from the present case *Lewis* v. *Great Western R. W. Co.*, L. R. 3 Q. B. D. 195, upon which great stress was laid at the bar. The Court there held that the debated expression had by the course of dealing between the parties acquired a conventional meaning, which was that it excluded liability except for wilful misconduct. That is a widely different thing from assigning a general meaning in law to the phrase.

In most of the numerous cases upon which I have already commented, it will be observed that the company guarded itself against responsibility for loss or damage "however caused," and these last words have been emphasized in reading the contract.

Although the terms employed in such cases as *Philips* v. *Clark*, 2 C. B. N. S. 156, and *Martin* v. *Great Indian Peninsular R. W. Co.* L. R. 3 Ex. 9, are not the same, the rules of construction applied by the Courts are closely applicable. The conditions inserted, namely, "not to be liable for leakage or breakage," and "the company accepting no responsibility," wide as they were, did not shield the company from answering for negligence.

These views seem to be fortified by the course of reasoning adopted in the numerous cases where the question was whether conditions were just and reasonable. For example, in pronouncing the opinion of the majority of the Exchequer Chamber in *McManus* v. *The Lancashire and Yorkshire R. W. Co.*, 4 H. & N. 327, Williams, J., said, at p. 449: "It is unreasonable that the company should stipulate for exemption from liability from the consequence of their

own negligence, however gross, or misconduct however flagrant." I think it is only just to hold that if a company desires to make a contract thus stigmatized, it must use terms which are not open to doubt.

Although I confess that I should have been better satisfied if the verdict had been for a more moderate sum, I cannot see sufficient reason for disturbing the judgment; and, in my opinion, the proper course is to dismiss the appeal, with costs.

BURTON, J. A.—The oil, the loss of which was the subject of this action, was shipped by the plaintiffs at London, upon a request note signed by them and a corresponding receipt granted by the defendants, whereby they undertook to carry it to Halifax, Nova Scotia, subject to the terms and conditions endorsed upon it, and by which they stipulated and the plaintiffs agreed that the company should not be responsible, *inter alia,* for any articles conveyed upon their railway, unless the same be signed for as received by a duly authorized agent; nor for damages occasioned by delays from storms, accidents, over pressure of freights, or unavoidable causes; nor for damages from the weather, heat, or delays of perishable articles; nor for leakages from any cause whatsoever; and that oil would, under no circumstances, be carried, save at the risk of the owners or parties by whom it was consigned. There was a further provision endorsed, to the effect that no claim for loss or damage would be allowed unless notice in writing were given to the station freight agent within twenty-four hours after the goods were delivered.

There was, at the trial, conflicting evidence of a conversation alleged to have occurred between one of the plaintiffs and the station agent at London, some days before this shipment, as to the oil being shipped in covered cars. It is denied by the station agent; but the learned judge has found as a fact that this verbal conversation did take place, and was part of this contract, and that finding has been upheld by the Court of Common Pleas. That Court has

also held that this verbal contract may be imported into and incorporated with the printed receipt. This view of the law is contested by the appellants, and constitutes the first subject of appeal.

I agree that where it appears that the real contract was not contained and was not intended to be expressed in the writing, it is admissible to show by verbal evidence what the real contract is; but I am unable to ascertain what there is upon this evidence to shew that the parties did not contemplate that the consignment note and receipt should be the final and complete contract between them.

In *Holding* v. *Elliott*, 5 H. & N. 117, although parol evidence was admitted to shew that the sale took place long before the invoice was made out or contemplated, and that the invoice was not in truth the contract between the parties, but was given for another purpose, Martin, B., remarked, that if, at the time of the sale, an invoice be made out, or anything pass to show that the parties meant the invoice to be the contract, it would be; and that in such case, parol evidence would not be admissible to contradict it.

The case chiefly relied upon was *Malpas* v. *The London and South Western R. W. Co.*, L. R. 1 C. P. 336. That was not a case of mere conversation or negotiations preceding and differing in their terms from the actual writing purporting to be the contract. There, the cattle were delivered to be carried to King's Cross a point not on the defendants' line, but on the North London Railway and the charges paid for the carriage to that point. The defendants' agent handed to the plaintiff a consignment note, which he signed without reading, which had reference only to the carriage to Nine Elms, a shorter distance, and the point of junction, as I understand, of the two lines. The sum to be paid for carriage was not mentioned in it, and it was manifest that it was a mere link in the chain of evidence by which this contract was attempted to be established, and not the contract itself, and there was nothing inconsistent with the verbal evidence, which established

that, in addition to the carriage upon the defendants' line, which was referred to in the consignment note, there was an additional verbal contract to carry a further distance on the line of the other railway.

If I could see that, in the present case, what occurred between the plaintiffs and the station agent previous to the delivery amounted to a concluded agreement for the carriage of this oil, then I should agree with the learned Chief Justice that the parol evidence could not be excluded, as it would be manifest that it was not intended that the shipping note and receipt should contain the entire contract. I have not been able to bring myself to the conclusion that the conversations were anything more than negotiations. It is not, however, very material to consider how this was, as the plaintiffs have failed to shew any authority in the agent to make such a contract; on the contrary, the defendants appear to have adopted every possible precaution to limit the authority of their agents, and to make that limitation known to parties dealing with them.

But the learned Judge has found, and the Common Pleas have affirmed this finding, that having regard to the nature of the article to be conveyed and the season of the year, the defendants, irrespective of any express contract to carry in covered cars, were guilty of gross inexcusable negligence in not sending the oil forward in covered cars, and in the great delay beyond what was reasonable in forwarding it. I cannot say that it is at all clear to me that there was any unreasonable delay or that the plaintiffs sustained a loss resulting from the negligence of the defendants to the extent claimed, but with that we have nothing to do, as there was evidence which satisfied the learned Judge, and the Court which alone could properly deal with that question has expressed its concurrence in the finding. All that we have to consider is, whether the defendants can be made liable under this contract, which provides that oil is to be carried at the "owner's risk."

The learned counsel for the defendants contended that they were relieved of all liability, except that arising from

the *wilful miscon·luct* of their servants, and referred to *Lewis* v. *The Great Western R. W. Co.*, L. R. 3 Q. B. Div. 195, as an authority for that position. That case is, however, essentially different from the present. The company there had two rates of carriage, a higher rate when they took the ordinary liability of carriers, and a lower when they were relieved of all liability except that arising from wilful misconduct of the company's servants. The receipt or forwarding note signed by the plaintiff there requested the company to receive and forward the goods, and at the foot of this receipt were the words, "Owners' risk," but it contained no reference in the body of it to the consignment note in use by the defendants, or the conditions endorsed upon it, which defined what was meant by "owners' risk," and restricted the liability of the company as above indicated. Strictly therefore the consignment note and conditions could not be looked at, and the Court were consequently compelled to construe the document within the four corners of it, but in doing so were at liberty to avail themselves of the recognized aids which judges are entitled to make use of for such a purpose, such as the surrounding circumstances and the course of dealing between the parties. In that case it had been established that there was a course of dealing between the consignor and the railway company by which goods were carried under two kinds of contract. Under one of these, the company assumed all the risks of carriers—the liability of insurers. Under the other, goods were carried at a reduced rate with what was compendiously termed "owners' risk," which the Court there held, having regard to the course of dealing which had been established, to mean at the risk of the owners in consideration of the lower rate, plus the liahility of the company for the wilful misconduct of their servants.

That case therefore affords but little assistance in construing the words "owner's risk," as found in this contract, for, as remarked by Cotton, Lord Justice, in his judgment, at p. 212: "We cannot look to the acts of the parties for

the purpose of finding what their intention was, but we may look to their course of dealing to see whether they have given a conventional meaning to any terms used in the contract."

In that case the plaintiff had previously sent goods in the same way, and in fact with and under the condition that they were not to be liable except to the extent I have mentioned, and he and the Company had treated the words as meaning the same thing. Here there is no evidence of such previous course of dealing, or that the words had between these parties received any conventional meaning.

The case of *McCawley* v. *The Furness R. W. Co.*, L. R. 8 Q. B. 57, proceeded on the ground that the plaintiff was a passenger travelling on a free pass. A carrier of passengers is not an insurer as a carrier of goods is. The only liability in such a case is for negligence; and when a passenger accepted a pass at his own risk, it was equivalent to an agreement that he would not hold the company liable as they otherwise would be, for the consequences of an accident caused by their negligence. The only liability was for negligence, and the only meaning to be given to the words "at his own risk," was that he assumed that risk and relieved the defendants from it.

Robinson v. *The Great Western R. W. Co*,, 35 L. J. C. P. 123, referred to in the Court below, is also not in point. It simply decides, that if the contract were to carry goods at the owners' risk and, deliver them within a stipulated time, it would be a breach of that agreement not to deliver them within that time, the words at owner's risk applying merely to the ordinary risks incurred by goods whilst being carried. As explained by Erle, C. J., at p. 127: "If a railway company are bound to carry horses in twenty-four hours, at the owner's risk, and the horses do not arrive accordingly, then, whether the horses are damaged or not, there is a breach of contract for which the company are liable." *D'Arc* v. *The London and North Western R. W. Co.*, L. R. 9 C. P. 325, appears to me to be open to the same remark, it being no answer to a complaint that goods which

were contracted to be delivered within a reasonable time, were not so delivered, to say that they were to be carried at the risk of the owner.

Martin v. *The Great Indian Peninsular R. W. Co.*, L. R. 3 Ex. 9, seems to me to be more in point. The defendants there pleaded that the plaintiff and his luggage were received to be carried, and at the time when, &c., were being carried, under certain contracts with her Majesty's Indian government, by which it was provided, with respect to the luggage, that the defendants should be under no responsibility; and that whilst being so carried it was destroyed. The plaintiffs, in their replication, set out the conditions in *hæc verba*, which contained this provision: "the baggage shall remain in charge of a guard provided by the troops, *the company accepting no responsibility.*" It then averred that the defendants did not use due and proper care and diligence in carrying the luggage, but, on the contrary, were guilty of gross negligence and wilful default, whereby and by reason whereof the luggage was burnt and destroyed, &c. To this there was a demurrer, and Kelly, C. B., in delivering judgment used this language p. 12: "It is contended by the defendants that, though it must, on demurrer, be taken that the luggage was destroyed by their own gross negligence and wilful default, yet under the proviso set out in the replication they are protected from liability; but we are all of opinion that though this limitation of responsibility would cover any loss of the luggage in the custody of the guard, occurring through the want of due care on the part of the officer in charge, or those under him, yet it is not applicable to luggage lost through the mere negligence of the company. The pleadings suggest a destruction by fire through the defendants' negligence."

A passage in a judgment of Lush, J., in *Gill* v. *Manchester R. W. Co.*, L. R. 8 Q. B. 186, seems also to have a bearing on the construction which should be given to words of this nature when used in a contract for the carriage of goods, p.

196: "It cannot, I think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the exception of perils of the sea, in a bill of lading, relieves a ship owner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable care and skill, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability: but if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him."

In *Phillips* v. *Clark*, 2 C. B. N. S. 156, there was a clause in the bill of lading that the ship owner was not to be liable for leakage or breakage, and it was there contended that the defendant was exempted by the terms of his contract from liability under all circumstances: that the words were as general as could possibly be conceived, and protected him even against the consequences of negligence. But the Court refused to put that construction upon them.

"Admiting," said C. J. Cockburn, at p. 162, "that a carrier may protect himself from liability for loss or damage to goods entrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms, yet it seems to me that we ought not to put such a construction upon the contract as is here contended for, when it is susceptible of another and a more reasonable one. It is not to be supposed that the plaintiff intended that the defendant should be exempted from the duty of taking ordinary care of the goods that were entrusted to him."

In *Lloyd* v. *The General Iron, Screw, Collier Co.*, 3 H. & C. 284, an exception in a bill of lading of accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever, was held not to exempt the ship owner from responsibility for loss of goods by

reason of a collision caused by the gross negligence of the master or crew.

These cases were approved of in the Exchequer Chambers, in the case of *Grill* v. *The General Iron Screw Colliery Co.*, L. R. 3 C. P. 476.

The question therefore would seem to resolve itself into this: What did the parties intend by the contract they have entered into? No doubt these parties might have entered into a contract by which the defendants would not be responsible for negligence, however gross. At the time it was entered into there was no such provision as at present exists, placing it in the power of the Court to say whether the contract is just and reasonable.

It is urged, on the part of the defendants, that there was no duty cast upon them to carry oil, and that they only consented to do so on condition of their being absolved from all liability in case of damage in consequence of their doing or omitting to do something which, in the carriage of ordinary merchandize, they were not required to do, and that any negligence charged against them must be such acts as would be negligence in ordinary cases, and not acts or omissions which become negligence because of the peculiar commodity carried—that in other words, the contract itself provides that such acts or omissions shall not be called negligence.

But this brings us back to the same point. The company could undoubtedly have made such a stipulation; the question is, have they done so? If their conditions had been applied to a contract for the carriage of such articles as cream or butter, would the defendants have been justified in carrying them in an oil or cattle car, whereby the flavour would have been destroyed and the articles rendered valueless, or would they have been justified, under a similar contract, in carrying pigs or cattle in a closed car, causing death by suffocation before the end of the journey?

There is a construction we can place upon these words without leading to results so unreasonable as these. A common carriers, these defendants would have been bound

to the strictest care in the carriage of oil, and, excepting only such damage as might happen from the act of God or the Queen's enemies, to deliver it at the end of the voyage in the same state and condition as they had received it in.

The defendants intended, by the introduction of these words into the condition, to get rid of some portion of their obligation, but it does not appear to me to be an unreasonable construction to hold that they were merely intended to exempt them from their ordinary common law liability, and not from responsibility for damage resulting from their own negligence.

They should be construed most strongly against the company, and in my opinion the language of a condition which would utterly absolve a company from taking any care at all of the goods entrusted to them to carry, should be clear beyond all question or dispute. Here the words are susceptible of two constructions, and to give to them the construction contended for by the defendants would be giving to the contract a sense not necessarily involved in the words used.

The Court below has found that the loss in the present instance arose from the inexcusable neglect of the defendants in not carrying the oil in a proper manner, and that being established the terms of the condition afford no answer.

I agree with the Court below that the twelfth condition, as to giving notice in writing to the station freight agent, applies only to losses occurring upon goods to be delivered upon their line, and not to goods addressed to consignees at points beyond the places at which the company have stations.

In the view I take of the case, the plaintiffs are not entitled to recover on the three special counts of the declaration as at present framed, but as any amendment should have been made to enable the plaintiffs to recover, if entitled to recover upon the evidence, I consider the declaration as amended.

For the reasons stated, I think the judgment should be affirmed, and this appeal dismissed, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF APPEAL,

FROM FEBRUARY 3RD, 1879, TO JANUARY 26TH, 1880.

ABANDONMENT.

Of seizure.]—*See* EXECUTION.

ACCEPTANCE.

See SALE OF GOODS.

ACCOUNT.

Parol evidence—Statute of Limitations.]—The bill sought an account of the rents and purchase money received by the defendant upon the lease and sale of lot 18, containing 100 acres of land, in which it alleged that the plaintiffs' father (now dead) and the defendant, his brother, were jointly interested. It appeared that the deceased had for years assisted the defendant in improving and cultivating this lot, on which they lived. The defendant had spoken of his brother having a deed of 50 acres of the place on which he lived. It was shewn that the defendant, who had the fee of the whole lot, had, in 1850, made a deed to his brother of some land, which the plaintiffs insisted was 50 acres of this lot; but this deed could not be produced owing to its either having been lost or destroyed. The defendant denied this, but he admitted having given his brother a deed of the adjoining lot 17 for the purpose of enabling him to vote. Lot 17 contained 120 acres, and the defendant's only interest in it was, that the person from whom he purchased lot 18 accidentally cleared a few acres on it, and the Inspector of Clergy Reserves reported that he claimed the lot, but he was never recognized as a purchaser, and never made any payment on account of the land. The deed to the deceased had never been registered. In 1856 the defendant made a lease of lots 17 and 18 to F., which transaction was negotiated by the deceased, and in 1875 the defendant sold lot 18 to F., with the concurrence of the deceased. The defendant swore that the deceased had never made any claim to the rent, and denied the whole case attempted to be made by the plaintiffs, but his

evidence was not consistent or corroborated.

Held, affirming the judgment of *Spragge*, C. (26 Gr. 18) that the evidence shewed that the deceased was the owner of the half of lot 18; that the whole of the land having been sold with his assent, and the whole of the purchase money received by the defendant, it was so received for their joint use and benefit, and that the plaintiffs were therefore entitled to an account.

Held, also, that the right to claim the purchase money did not arise till the sale, and therefore the Statute of Limitations did not prejudice the plaintiffs' claim. *Curry et al.* v. *Curry*, 63.

Affirmed on appeal to the Supreme Court.

ADMINISTRATOR.

Administrator pendente lite—Suit against — Accounting — Costs.] — Pending proceedings in the suit of *Wilson* v. *Wilson*, to set aside the will of T. W., the defendant H. was appointed administrator *pendente lite*. After a decree was made setting aside the will, a prior valid will was proved by the plaintiffs in this suit, J. W. & C. B., as executors, the latter having also been an executor under the former will, and one of the plaintiffs in *Wilson* v. *Wilson*. Under an order made just before the conclusion of the suit of *Wilson* v. *Wilson*, H. passed his accounts, and a report was made determining the result of his dealings with the estate. Shortly afterwards the plaintiffs, J. W. & C. B., filed a bill against H. & D., who was the plaintiff's solicitor in the former suit, charging that H. employed D. as his legal adviser in all matters connected with the estate; that D. received large sums of money which he retained for a long time; that the Master on passing H.'s accounts and moderating D.'s bill of costs, refused to allow C. B. to appear on the inquiry; that at the procurement of D. another solicitor was appointed to represent H.; that he did not oppose the allowance of many objectionable items; and that H. had received sums of money for which he had not accounted. The prayer was that the accounts and bills of costs might be opened up, and that the defendants might be ordered to pay into Court such sums as might have been over-paid or wrongly charged. The proceedings in which the costs complained of were incurred had not been sanctioned by the Court, and were taken by H. upon his own responsibility.

Held, reversing the decree of Blake, V. C., that an administrator *pendente lite* is amenable to a suit in equity; and that H. was liable to account to the plaintiffs.

Held, also, that the plaintiffs were right, in not having proceeded by petition in the suit of *Wilson* v. *Wilson*, in which J. W. was not a party, and C. B., though a party, did not represent the beneficiaries under the first will.

Held, also, that the bill could not be sustained as against D., for if H. had improperly paid him costs out of the estate, H. was liable, but there was no privity between D. and the plaintiffs.

As the plaintiffs' true equity was only obscurely asserted by the bill, and the reasons of appeal, they were refused the costs up to the hearing and of the appeal.

Semble, that D. should only have recovered the costs of a successful demurrer in the Court below; and the

appeal against him was, therefore, dismissed without costs. *Beatty* v. *Haldan et al.* 239.

ADMISSIONS.

At election trial.]—*See* PARLIAMENT, 1.

AFFIDAVIT.

Omission of Commissioner's signature from.]–*See* CHATTEL MORTGAGE.

AGREEMENT.

See RAILWAYS AND R. W. COS.

ALIENATION.

Restraint upon.]—*See* WILL, 2.

AMENDMENT.

Under A. J. Act, sec, 50.]—*See* PURCHASE FOR VALUE WITHOUT NOTICE.

See RAILWAY AND R. W. COS.

APPEAL.

Under sec. 19 *of R. S. O. ch.* 165.] *See* ARBITRATION.

From Judge sitting for Court.]—*See* HABEAS CORPUS.

See PARLIAMENT, 2.

Costs of.]—*See* ADMINISTRATOR—WILL, 2.

Unnecessary length of appeal books commented on.—*See* INSURANCE, 7.

ARBITRATION AND AWARD.

As to crossing under sec. 9, *sub-sec.* 15, *R. S. O. ch.* 165—*Appeal therefrom—Motion to set aside the award.*]—Arbitrators appointed under the Railway Act, R. S. O. ch. 165, to determine the compensation to be paid by the Credit Valley Railway to the Great Western Railway in respect of their power of crossing the latter railway under sub-sec. 15 of sec. 9 of the Act, made an award on the 31st of December, 1877. On the 19th of February, 1878, after Hilary Term had expired, the Great Western Railway obtained a rule *nisi* to set aside the award, and took steps to appeal against it, under sec. 19 of R. S. O. 165, within the month after the award, by filing a bond for costs and giving notice of intention to appeal.

Held, affirming the judgment of *Armour*, J., that this was not a submission to arbitration within 9 & 10 Wm. III., ch. 15, or sec. 201 of the C. L. P. Act so as to enable the submission to be made a rule of Court; and that even if it were, the motion for the rule *nisi* should have been made before the last day of Hilary term; and that the appeal therefrom was too late, as the giving security was not a commencement of the appeal within the meaning of sub-sec. 19 of sec. 20.

Semble, also, that the appeal given by that section is confined to arbitrations respecting lands and their valuation, and does not extend to an arbitration with regard to the intersection of railways. *Re the Arbitration between the Credit Valley R. W. Co. and the Great Western R. W. Co.* 532.

See INSURANCE, 1.

ASSESSMENT AND TAXES.

Sale of lands for taxes—Indian lands—B. N. A. Act, sec. 91, *clause* 24 — *Liability to taxation—Lands not mentioned in warrant,* 32 *Vic. ch.* 36, *sec.* 128, *O.—Lists not properly authenticated* — Sec. 155.]—In 1854, a tract of land was surrendered to the Crown by the Indians, to whom the interest arising from the sales thereof by the Crown was to be paid. The lands were retained under the management of the Indian Department, and were called Indian lands, and after the passing of the B. N. A. Act, still continued under the management of this department, which was under the control of the Dominion Goverment, "Indians and lands reserved for Indians," being by sec. 91, clause 24 of that Act, exclusively assigned to the Dominion. In September, 1857, the lot in question being a portion of such lands, was sold by the Crown, the first instalment of the purchase money being paid on the 15th of Febuary, 1858, and the last on the 29th of July, 1867, when the lot was paid for in full, and on the 14th June, 1869, the patent from the Dominion Government issued therefor. In 1870, the lot in question was sold for the taxes assessed and accrued due for the years 1864-9.

Held, affirming the judgment of the Common Pleas, 28 C. P. 384, that upon the lands in question being surrendered to the Crown, they became ordinary unpatented lands within the meaning of the Assessment Acts, and liable to taxation under 29 Vic. ch. 19, re-enacted in 1866, and the sale was therefore valid.

It was contended that the Ontario Legislature having repealed the Act of 1866, had after Confederation no power to levy these taxes, the land having been withdrawn from their jurisdiction; but,

Per *Moss*, C.J.A., that this objection was completely met by the remarks of *Gwynne*, J., in the Court below.

Per *Burton*, J.A.—Assuming the lands to come within the definition of Indian reserves, the Local Legislature had not attempted to tax lands placed under the control of the Dominion Government, but has treated the purchaser of such lands as the owner, and declared them liable to assessment in his hands.

Held, also, that the fact that the patent was issued to the plaintiff after the accrual of the taxes did not entitle him to succeed in this action, leaving the purchaser to proceed for a cancellation of the patent, making the Crown a party to the suit, because the patent was issued before the sale, and this passed the patentee's interest to the purchaser; but, *semble*, that such a course would have been necessary if the patent had been issued to the locatee after the sale.

The warrant authorized the sale of "the lands hereinafter mentioned." The lands were not mentioned in the warrant, but were contained in a list attached thereto which made no reference to the warrant; nor were the lists authenticated with the seal of the corporation and the signature of the warden as required by sec. 128 of 32 Vic. ch. 36.

Held, that the description of the lands was a sufficient compliance with the above section, and that the want of the seal and signature on the lists was cured by the 155th section. *Church* v. *Fenton*, 159.

This case has been carried to the Supreme Court.

ASSIGNMENT.

Of insured property.]—*See* INSURANCE, 5.

BAILIFF.

Division Court bailiff—Action for false return.]—To an action against a Division Court baliff and his sureties for neglect to execute a writ or return it in due time, and for a false return, the defendants pleaded that the execution was not enforced owing to a threat by the principal creditors of the debtor to place him in insolvency if it was proceeded with, and that while the goods were being advertised for sale an attachment was issued against the debtor, and the plaintiffs suffered no damage in consequence of the breaches alleged.

At the trial the jury were directed to find a verdict for the defendants, on the ground that this plea and another had been proved.

Held, reversing the judgment of the County Court of York, that it was for the jury, and not for the Judge, to say whether the bailiff's inaction had caused the plaintiffs damage, and a new trial was therefore ordered.

Semble, also, that under sec. 221 of the Division Courts Act, R. S. O. ch. 47, the plaintiffs were entitled to nominal damages upon proof of a breach of duty without showing any actual damage.

Before the commencement of this action the plaintiffs had taken summary proceedings against the bailiff for neglecting to levy under sec. 220, when their complaint was dismissed.

Held, no bar to this action, which was brought under sec. 221. *Nerlich et al* v. *Malloy et al.*, 430.

BALLOTS.

At election trial.]—*See* PARLIAMENT, 1.

BANKRUPTCY AND INSOLVENCY.

1. *Insolvent Act*, 1875—*Fraudulent preference.*]—The insolvent paid a note to the holder at the request of the sureties who had given a mortgage to secure the amount of the note within thirty days of his being placed in insolvency. It appeared that when the sureties made this request neither they nor the creditor who held the note and mortgage knew or had probable cause for believing that the insolvent was unable to meet his engagements in full.

Held, reversing the decree of *Proudfoot*, V.C., that the payment was not void within the meaning of the 134th section of the Insolvent Act of 1875, and that the assignee had no right to have the mortgage reinstated as against the sureties. *Nelles* v. *Paul*, 1.

2. *Insolvent Act of* 1875—*Married woman—Separate trading.*]—Under the Insolvent Act of 1875 a married woman may make herself liable to be placed in insolvency.

At a meeting of the insolvent's creditors a sale of his estate was made to his wife, who was not present at the meeting and took no personal part in its inception or completion. It was arranged that the purchase should be in her name, and that she should give her promissory notes for the price, secured by a mortgage upon her separate real estate. It appeared that it was understood by every one engaged in this transaction that its object was to enable the

husband to continue the business. After the security had been given the shop was re-opened: the same sign-board remained over the door, and the business appeared to be carried on precisely as before. Purchases of goods were made in her name, for which she signed notes, but the orders were always given by her husband, and the correspondence, although conducted in her name, was written and signed by him without any communication with her. As soon as he obtained his discharge he substituted his own name for his wife's in correspondence and in notes. Upon a writ of attachment issuing against her after her husband's discharge:

Held, affirming the judgment of the County Court, that even if the stock-in-trade was her separate property, she never employed it in trade separate from her husband, but allowed him to employ it in a business really his own—she was, therefore, not a trader within the meaning of the Insolvent Act of 1875. *In re Gearing, an Insolvent.* 173.

3. *Insolvent Act of* 1875—*Secs* 28, *sub-sec. b, and* 125—*Summary jurisdiction—Sale by auction of insolvent's interest in mortgage—Secs.* 38, 67, *and* 75.]—The summary jurisdiction of the Insolvent Court under sec. 28, sub-sec. *b*, and 125, only applies to creditors who are entitled to prove on the estate, or to persons who have an interest in the assets of the estate. The Insolvent Court has no jurisdiction to entertain a petition by a purchaser, who is not a creditor, to recover from the assignee a deposit paid upon a purchase at auction of the insolvent's estate.

It was objected that the sale of the insolvent's interest in a mortgage made to him and another, was invalid, as the assignee had not followed the conditions prescribed by either section 75 (as amended) or section 67 of the Insolvent Act of 1875.

Held, that such an interest is not "real estate" within the meaning of sec. 75; that sec. 67 did not apply to the sale of a single asset, such as a mortgage; and that the sale was within sec. 38, under which the assignee had acted, and with which, under the circumstances set out below, he had sufficiently complied. *Re Parsons*, 179.

4. *Insolvent Act of* 1875--*Insolvent firm—Surplus estate—Division of—Lien for advances by partner—Interest*—On the insolvency of the firm of C. & Coombe, the requisite proportion of creditors granted C. his discharge, and sold him the insolvent estate at a certain price, for which he gave his promissory notes payable at intervals. Shortly afterwards he entered into partnership with one M., and a memorandum was executed by them by which they agreed that this estate should form their stock-in-trade and become their property equally, and they equally assumed the liability for the amount of the composition notes. While the greater part of these notes was still unpaid, they made an assignment in insolvency. From their assets sufficient was realized to pay their partnership creditors in full, and leave a surplus. During the partnership of C. & M., M. had advanced $500 to the firm, and C. had drawn out of the business $88.26 in excess of his share. The creditors of C. claimed that the whole of the surplus should be applied to the payment of the compo-

sition notes; but, *Held*, that M. was first entitled to be paid the $588.26 with interest upon the $500, as that was a loan to the firm, but no interest upon the overdraft; and that C.. and through him, his creditors had a right to insist upon the composition notes being paid before any of the residue of the surplus was divided between C. & M. *Re Cleverdon* 185.

5. *Insolvent Act of* 1875, *secs.* 84 *and* 106—*Secured creditor—Realization of security by—Right to prove for deficiency.*]—A creditor holding security from the insolvent may, under sections 84 and 106, assume any one of three positions, either release his security and prove as an unsecured creditor, or he may value his security and prove for the whole debt less the valuation, or he may outside of insolvency proceedings realize his security in any manner authorized by law. The plaintiff, who was mortgagee of lands of the insolvent, obtained against the assignee the usual decree for sale with a special direction that he should be at liberty to prove against the estate for any deficiency.

Held, reversing the decree of *Proudfoot*, V. C., that under secs. 84 and 106, the plaintiff was not entitled to prove for such deficiency.

Re Hurst, 31 U. C. R. 116, commented on, and questioned. *Deacon* v. *Driffil*, 335.

6. *Insolvent Act of* 1875—*Proof by retiring partner for balance due.*]—The creditors of a partnership consisting of three partners, consented to give them an extension on several conditions, one being that one of the partners should retire from the firm. When the dissolution took place a sum of $1,198 stood on the books of partnership to the credit of the retiring partner, but nothing was said at the time in reference to this claim.

Held, that this claim was not provable against the estate of the continuing partners on their insolvency. *In re White and Gibbon, Insolvents.* 416.

7. *Insolvent Act of* 1875—*Composition Deed — Construction.*]—A deed professing to be under the Insolvent Act of 1875 was made between the insolvent of the first part, certain sureties of the second part, and "the several firms, persons, and corporations who are creditors of the parties of of the first part, and are also mentioned in the annexed list, of the third part." It provided for the payment of a composition of 75 cents in the dollar, which payment was guaranteed by the sureties, and concluded with the following clause:—"This deed shall be ineffectual unless and until completed by all creditors having claims for over one hundred dollars."

Held, on demurrer, affirming the judgment of *Osler*, J., that this clause only applied to creditors mentioned in the annexed list, and that certain other creditors refusing to execute the deed did not prevent it from being operative. *Gault* v. *Baird et al.* 436.

8. *Insolvent Act of* 1875—*Claim for rent.*]—Upon the insolvency of the lessee the assignee in insolvency sold the insolvent estate, including the goods upon the demised premises, on credit, without paying the rent due thereon.

Held, that the landlord was entitled to an order for immediate payment of the arrears.

Remarks as to the personal liability of the assignee under such an order.

Per Moss, C.J.A. —If before the assignment or attachment in insolvency the landlord has levied, the assignee cannot take the goods out of his possession without payment or tender of the six months' arrears of rent.

After the assignee has taken possession the landlord cannot seize, but he is entitled to be paid the six months arrears out of the proceeds of the goods on the demised premises in preference to any other claim.

The landlord is not a privileged creditor, but is only entitled to a lien upon the proceeds of the goods of the insolvent which he might have distrained.

If the assignee sells the goods upon credit he must arrange with the lanlord before the goods are removed, otherwise he becomes liable to an order for immediate payment.

If the creditors or inspectors order him to make such a sale, and do not provide him with the means of satisfying the landlord, he should apply to the Judge for directions.

Whenever the assignee remains in possession unreasonably long without realizing and paying the landlord, the latter may invoke the summary jurisdiction of the Court. *In re McCraken—Dallas* v. *Stinson*. 486.

9. *Insolvency—Money paid within thirty days—Action to recover the same.*]—A. sold his stock-in-trade and assets of all kinds to S., the sale being arranged and carried out by one R., to whom the cash portion of the purchase money was paid. R. afterwards, and within thirty days of A's being declared insolvent, accepted and paid out of this purchase money two drafts drawn on him by the defendant, being the price of goods for which A. was indebted to the defendant. The plaintiff, as assignee in insolvency of A., sued the defendant to recover back the money so paid him. The defendant set up that the drafts were drawn on, and the money paid by R., under a personal undertaking contained in letters written to him by R.

Held, affirming the judgment of the Common Pleas, 29 C. P. 576, that the plaintiff was entitled to recover: that the evidence shewed that defendant had probable cause for believing A. to be insolvent when he received the money, which clearly belonged to A.; and that R. made such payment out of A.'s money and as his agent.

Held, also, that the acceptance was not a valuable security within sec. 134 of the Insolvent Act of 1875, which the assignee was obliged to restore to the defendant as a condition precedent to the prosecution of the suit. *Miller* v. *Reid*, 479.

10. *Deposit by insurance company —Creditors entitled to rank thereon —Jurisdiction of Assignee*—31 *Vic. ch.* 48, *D.*—38 *Vic. ch.* 20 *D.*]—The defendants were licensed under 31 Vic. ch. 48, D. to transact fire and inland marine insurance, while their original charter authorized the transaction of fire and marine insurance, without distinction of ocean from inland marine.

Held, affirming the decree of *Proudfoot*, V. C., 26 Gr. 354, that the holders of ocean marine policies, though resident in Canada, were not, on the insolvency of the defendants, entitled to rank as creditors on the fund deposited with the Government of Canada.

Under that Act, companies confining themselves to ocean marine

insurance were not bound to make a deposit or obtain a license.

Held, also, that under 38 Vic. ch. 20, D. it was the duty of the assignee to determine the right of the policy holders to rank upon the deposit; and not merely to report the claims proved.

In construing an obscure clause in an Act of Parliament, the Court may look at the title for assistance.—*Greene* v. *Provincial Ins. Co.*, 521.

11. *Insolvent Act of* 1875—*Fraudulent mortgage—Evidence—Burden of proof*—The insolvent, on the 17th of September, 1877, gave a mortgage to the defendant, the alleged consideration being a prior debt of $600 and an advance in cash of $1800. On the 18th of October the writ of attachment issued. It was not pretended that any money was paid before the 1st of October.

Held, that the onus of supporting the transaction was upon the defendant; and, reversing the decree of *Proudfoot*, V. C., that the evidence, which is fully set out below, was wholly insufficient, and, on a bill filed by the assignee in insolvency, the mortgage was set aside. *Rice* v. *Bryant*, 542.

12. *Joint stock company—Assignment in insolvency—Headings of statutes.*]—*Held*, affirming the judgment of the Common Pleas, 30 C.P. 240, that the directors of a joint stock company incorporated under the Canada Joint Stock Companies Letters Patent Act, 1869, 32 & 33 Vic. ch. 13 D., and subject to the Insolvent Act of 1875, cannot, without being authorized by the shareholders, make a voluntary assignment in insolvency.

The headings of a statute may be referred to, to assist in the construction of ambiguous provisions. *Donly* v. *Holmwood*, 555.

See EQUITABLE EXECUTION.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Money paid under mistake—Promissory note—Evidence.*]—Upon a purchase of land from one Mrs. C., the plaintiff gave her a mortgage for $1,100, of which $200 was paid at the time of execution, and endorsed on the mortgage, the balance was to be paid in nine equal instalments with interest at six per cent., the first of which became due on the 7th of November, 1875. At the same time the plaintiff gave her nine promissory notes, payable at intervals of one year. The first of these notes was drawn payable to Mrs. C. or bearer, one year after date, and contained the additional words:—"Which when paid is to be endorsed on the mortgage, bearing even date with this note." In August, 1875, Mrs. C. and her husband executed an assignment in general terms of this mortgage to the defendant, purporting to grant and assign all the estate and interest of Mr. and Mrs. C.. in the land, and the mortgage and the moneys thereby secured. In the recital descriptive of the mortgage, it was stated that, in consideration of $1,100 the plaintiff conveyed and assured the lands by way of mortgage to Mrs. C. The amount then due upon the mortgage, was not expressly mentioned in the assignment. At the date of the assingment, the first note had been transferred to a third party for value. The plaintiff in ignorance of this, paid the amount of it to the defendant, to whom he

had been notified the mortgage had been assigned. The defendant told the plaintiff that he had not got the note but that he would get it and give it to him. The plaintiff was afterwards sued by the holder of the note, and was compelled to pay it, whereupon he sued the defendant for the amount.

The jury found that the defendant only purchased $800 of the mortgage money and eight notes: that the plaintiffs made the payment under the impression that the defendant held the note as well as the mortgage, and that when the plaintiff paid the money, the plaintiff promised unconditionally to give him the note.

Held, affirming the judgment of of the County Court, that the note was a negotiable instrument; and that being negotiable and having been transferred before the assignment, parol evidence was admissible to show that it had not in fact been assigned to the defendant, and that under the circumstances, the plaintiff was entitled to recover. *Chesney* v. *St. John*, 150.

2. *Pleading — Promissory note— Double stamping—Replication of— Cancellation of Stamps—37 Vic., ch. 47, sec. 2.*] —*Held*, reversing the judgment of the County Court, that a replication of double stamping under 37 Vic. ch 17, sec. 12, D., need not be pleaded; the innocence of the holder and the double stamping of the note as soon as he acquired knowledge of the defect in the stamping being matters to be shewn to the satisfaction of the Court or Judge, and, therefore, not requiring to be submitted to the jury nor necessarily to appear on the record as a pleading.

Held, also, that although not necessary, such a replication would be proper, the plea of no stamps constituting a conditional defence only.

The plaintiff's cashier affixed double stamps to a note, the property of a bank, and cancelled them by writing thereon his own initials, and the date of the cancellation.

Held, following *Third National Bank* v. *Cosby*, 43 U. C. R. 58, that the cancellation was sufficient.

Baxter v. *Baynes*, 15 C. P. 27, considered. *Imperial Bank of Canada* v. *Beatty*, 228.

CARETAKER.

Possession as.]—*See* LIMITATIONS, STATUTE OF.

CARRIERS.

See RAILWAYS AND R. W. COS.

CHATTEL MORTGAGE.

Affidavit of bona fides—Omission of signature of Commissioner.] — When the signature of the Commissioner to the affidavit of *bona fides* to a chattel mortgage was omitted through inadvertence the instrument was held invalid as against a subsequent execution creditor, although it was satisfactorily proved that the oath was in fact administered.—*Nisbet* v. *Cock*, 200.

CHURCH.

See PRESBYTERIAN CHURCH.

COMMISSIONER.

Absence from affidavit of signature of.]—*See* CHATTEL MORTGAGE.

COMMITTEE.

Security of lunatic's.]—*See* LUNATIC.

COMPENSATION.

Property abutting on highway—Raising highway—"Injuriously affected"—Compensation—36 Vic. ch. 48, sec. 373, O.—R. S. O. ch. 174, sec. 456.]—*Held.* affirming the judgment of *Gwynne*, J., 43 U. C. R. 522, that where a municipality raises the highway in such a manner as to cut off ingress and egress to and from the property abutting thereon, the owners of such property are entitled to compensation under 36 Vic. ch. 48, sec. 373, O., for the injury caused thereby.

The cases upon the subject reviewed. *Yeomans* v. *The Corporation of the County of Wellington*, 301.

COMPOSITION DEED.

See BANKRUPTCY AND INSOLVENCY, 7.

CONDITIONS.

Statutory.]—*See* INSURANCE, 2.3,6.

Precedent.]—*See* INSURANCE, 4—RAILWAYS AND RAILWAY CO.'S.

CONGREGATIONAL PROPERTY.

See PRESBYTERIAN CHURCH.

CONSTITUTIONAL LAW.

See HABEAS CORPUS.
INSURANCE, 2, 3.

CONTRACT.

By letters.]—*See* SALE OF GOODS.

Parol evidence of.]—*See* RAILWAYS AND R. W. CO.'S.

CONVICTION.

Form of.]—*See* HABEAS CORPUS.

CORRUPT PRACTICES.

See PARLIAMENT, 4.

COSTS.

See ADMINISTRATOR—PARLIAMENT, 2—WILL, 2.

COURT.

Sittings of, dispensed with.]—*See* TRINITY TERM.

CREDITOR.

Bill filed on behalf of plaintiff and all other creditors—Effect of.—To a bill filed by the assignee in insolvency of P. D., for the creditors other than D. & J. S., to impeach a sale of real estate to the defendant, the answer set up that before the proceedings in insolvency a bill was filed by D. & J. S. as execution creditors, on behalf of themselves and all other creditors who should contribute to the expenses of the suit, for the purpose of avoiding the the conveyance in question as a fraud upon the creditors, and that the bill was dismissed upon the merits. It was further alleged, that the case made by the two bills was substantially the same, and that the defendant believed that the evidence in

this suit would be similar in effect to that upon which the decree refusing relief was founded.

Held, reversing the judgment of the Court of Chancery, that the decree was not a bar to this suit.

Held, also, that the bill set out below sufficiently averred the delivery of the alleged deed, and that the defect, if any, was removed by the answer. *Smith* v. *Doyle*, 471.

Purchase of equity of redemption by judgment.]—*See* JUDGMENT.

DAMAGES.

See SALE OF GOODS—BAILIFF.

DEED.

Delivery of.]—*See* CREDITOR.

DEFICIENCY.

Right to prove for.]—*See* BANKRUPTCY AND INSOLVENCY, 5.

DELIVERY.

Of deed.]—*See* CREDITOR.

DEPOSIT.

By insurance company—Creditor entitled to rank thereon.]—*See* BANKRUPTCY AND INSOLVENCY, 10.

DESCRIPTION.

Of land devised.]—*See* WILL, 1.

Of land in warrant.]—*See* ASSESSMENT AND TAXES.

DISSOLUTION.

Of partnership.]—*See* PARTNERSHIP.

DIVISION COURT.

See BAILIFF.

ELECTIONS.

See PARLIAMENT.

ENTRY.

Subsequent, on land.]—*See* LIMITATIONS, STATUTE OF.

EQUITABLE EXECUTION.

The testator bequeated to J. E. B. and his wife, B. J. B., certain real and personal estate, upon the following trust: "In the first place, to and for the suport and maintenance for himself and his wife in a fit and suitable manner according to their rank and station, during their joint lives and during the life of the survivor of them; secondly, for the support education, and maintenance of the children of the said J. E. B. and B. J. B., now living, or which may be hereafter born, the fruit of their marriage, according to their rank and station in life, and at the discretion of the said J. E. B. and B. J. B."

Power was given to the defendant and his wife jointly during their lives, and to him if he was the survivor, but not to her if she was the survivor, to sell the lands, mortgages, and all other securities. and to stand possessed of the proceeds upon the same trusts. Further power was given to them jointly and the survivor to divide the real and personal estate or the proceeds thereof, or so much thereof as remained unexpended and unappropriated in carrying out the trusts, between the said children and their said heirs, if any, in such man-

ner and in such proportion as to them might seem fit, or to exclude any of them entirely from any benefit or portion thereof if they should see fit so to do, or to convey or make over to any of them by way of advancement any portion of the same to become theirs absolutely.

Held, (reversing the decree of *Proudfoot*, V.C.,) that the gift was for the benefit of the defendant J. E. B. and his wife jointly, and that his interest could not be attached by an execution creditor.

Held, also, that the defendant had no estate in the lands corresponding to an estate at law: at most he had but a charge upon an income arising out of a mixed fund, the amount of which was in the discretion of the trustees, and the case in this aspect was within the rule in *Gilbert* v. *Jarvis*, 16 Gr. 265.

The object of an equitable execution is to impose on the equitable interest the liability which would attach at law on a corresponding legal interest.

An assignee in insolvency may assert rights to the estate of the insolvent which cannot be enforced at the instance of an execution creditor.

Godden v. *Crowhurst*, 10 Sim. 655, considered and followed.

Buchanan v. *Brooke*, 24 Gr. 585, overruled. *Fisken* v. *Brooke et al.*, 8,

EQUITY OF REDEMPTION.

Sale of, and legal estate together.]—*See* JUDGMENT.

EXECUTION.

Seizure—Abandonment—Waiver of.]—Under an execution against one R., the plaintiff's son, the bailiff wrote "seized" on part of a sawing machine belonging to R., but then on the premises of one S., which could not be moved owing to the roads being blocked with snow, and he went to the plaintiff's where the other part of the machine was, and told the parties that he seized it. He did nothing further for four months when he removed the machine a few days before he advertised it for sale R. made no objections to the sale which, however, was sold to S. with the full privity of R. Subsequently the plaintiff purchased it from S., R. having offered, as an inducement, to give him certain parts of the machine which he had concealed from the bailiff. After the purchase R. had, with the plaintiff's permission, the use of the machine. Some time afterwards R. made a chattel mortgage of the machine to the defendant.

Held, reversing the judgment of the County Court, that the seizure was valid, and that there was no evidence of an abandonment; but even if R. had had the right to insist that there had been an abandonment, he had clearly waived it, and had authorized the purchaser, S., to transfer an absolute title to the plaintiff. *Hincks* v. *Sowerby*, 113.

See EQUITABLE EXECUTION—BAILIFF—JUDGMENT.

EXECUTOR.

Giving time to one of three.]—*See* PRINCIPAL AND SURETY.

EVIDENCE.

Parol.]—*See* WILL, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—RAILWAYS & R. W. COS.

As to how voter voted.]—*See* PARLIAMENT, 1.

See BANKRUPTCY AND INSOLVENCY, 11.

FALSE RETURN.

Action against Division Court bailiff for.—*See* BAILIFF.

FELONY.

See HABEAS CORPUS.

FIRE INSURANCE.

See INSURANCE,

FORECLOSURE.

Of lunatic's estate.]—*See* LUNATIC.

FOREIGN JUDGMENT.

Pleading—23 *Vic. ch.* 24, *sec.* 1; 31 *Vic.* ch. 7, *O.*; 31 *Vic. ch.* 1, *sec.* 6, *sub-sec.* 34.]—To an action on a foreign judgment commenced previous to the repeal by 39 Vic. ch. 7, O. of 23 Vic. ch. 24, sec. 1, (which allowed the defendant to set up to the action on the judgment any defence which was or might have been set up to the original suit) the defendant, after the passing of the repealing Act, pleaded several pleas, setting up such defences.

Held, reversing the judgment of the Common Pleas, that they could be pleaded, as the right to plead was an "existing right" within the meaning of sec. 6, sub-sec. 34 of the Interpretation Act, 31 Vic. ch. 1 O.

A further plea to the judgment averred that the defendant was not at the commencement of the action, nor down to the judgment, resident or domiciled in the foreign country, and was never served with any process, summons, or complaint, nor did he appear to the action, or before the recovery of the judgment, have any notice or knowledge of any process or proceedings in the action, nor of any opportunity of defending himself therein.

Held, affirming the judgment of the Court of Common Pleas, that the plea was bad for not averring that the defendant was not a subject of the foreign country, and not amenable to its jurisdiction. *Fowler* v. *Vail*, 267.

FRAUD AND FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 1. 9, 11.

HABEAS CORPUS.

Habeas Corpus — Appeal from Judge sitting for the Court—29 & 30 *Vic. ch.* 45, *R. S. O.* 38, *sec.* 18—*Malicious wounding—Felony—Misdemeanor—Form of conviction*—32 *Vic. ch.* 20, *D.*; 38 *Vic. ch.* 47, *D.*]—An appeal does not lie to the Court of Appeal from a decision of a Judge sitting for the Court out of Term, on a motion to discharge a prisoner on habeas corpus, under either 29 & 30 Vic. ch. 45, or R. S. O. ch. 38, sec. 18.

The conviction charged that the prisoner did "unlawfully and maliciously cut and wound one Mary Kelly with intent to do her grievous bodily harm."

Held, affirming the judgment of the Queen's Bench, that if not sufficient to charge a felony under sec. 17 of 32 Vic. ch. 20, D., it was a good conviction for a misdemeanor under sec. 19, the unnecessary statement of the intent being immaterial. The police magistrate has jurisdiction under the constitution to try either of these offences. *In re Boucher*, 191.

HIGHWAY.

Highway—Right to deviate from—Non-repair.]—A bridge built by the township of Yarmouth over Kettle Creek, which crosses an original allowance for road, having become unsafe, and being only required by a few people as the most convenient access to the neighbouring town of St. Thomas, the council removed it, and in place of this route repaired another road leading to that place, which was very little longer. The bridge had been constructed obliquely across the road allowance, so as to cross the stream at right angles, and in order to reach the west end of it conveniently the road was widened by taking in a small piece of adjoining land, which was always used as part of the road with the consent of the owner, E. After the removal of the bridge it was impossible, owing to the height of the bank, to reach the water on the line of the road, and E. made a new road, running in a southerly direction over his property, from the brow of the bank to the creek, and formed by cutting part of the bank away, by which people continued to descend to the river where it was fordable, but the use of which the council had never recognized. In driving down this roadway, which was narrow and steep, the wheels of the carriage in which the plaintiffs, B. and his wife, were driving caught in two pieces of timber used as a support for the roadway next the river, and B.'s wife was thrown down the declivity and injured. The plaintiffs had passed the place on the day previous and were aware of its character, and of the removal of the bridge. The accident did not happen in the deviation from the original road allowance taken in as road for access to the bridge, though in turning off the road to go to the creek they passed over that place.

Held, affirming the judgment of the Queen's Bench, that the defendants were not liable, as they were not bound to keep the road on which the accident happened in repair.

Held, also, that while the bridge was used their liability for non-repair was not confined to the original road allowance, but extended to the deviation used in its place as an approach.

Held, also, that the doctrine that where a highway is found to be so obstructed as to be dangerous, a traveller may go *extra viam* passing as near the original road as possible, was not applicable under the circumstances, so as to make the defendants liable.

Held, also, that there was no duty cast on the defendants, as regarded the plaintiffs, to put up a notice warning people not to use the road down the bank, for the plaintiffs knew the place, and must have perceived that it was not a road opened up by defendants.

Coggswell v. *The Inhabitants of Lexington*, 4 Cush. 307, and *Ireland* v. *Oswego*, 13 Kernan 532, distinguished. *Boswell* v. *The Corporation of the Township of Yarmouth*, 353.

2. *Highway—Neglect to keep in repair—R. S. O. ch.* 174, *sec.* 491.]—On one side of a travelled road which the defendants were bound to keep in repair was a declivity, down which a pile of wood, composed of blocks cut in two feet lengths, had been thrown by a person living near the highway. Some of the wood was upon the bed of the road, but a portion, estimated at from 21 to 26 feet, was free from obstruction, and the road itself was not defective. The plaintiff's horse in passing shied at the wood, threw him off, and injured him.

Held, reversing the judgment of the County Court, that the defendants were not guilty of a breach of the statutory duty imposed upon them by R. S. O. ch. 174, sec. 491, to "keep in repair," and they were therefore not liable. *Maxwell* v. *The Corporation of the Township of Clarke*, 460.

HUSBAND AND WIFE.

See Bankruptcy and Insolvency, 2—Insurance, 9.

INSURABLE INTEREST.

Of married woman.]—*See* Insurance, 9.

INSURANCE.

1. *Insurance company—Reference arbitration—Pleading.*]—In an action on a policy of insurance the defendants, amongst other pleas, pleaded that the policy was subject to a condition that in case difference should arise touching any loss or damage, after proof had been received in due form, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy; and that no suit or action against the company for the recovery of any claim by virtue of the policy should be sustainable in Court of law or Chancery until after an award had been obtained fixing the amount of the claim in manner therein provided, and averred that before the suit differences did arise touching the plaintiff's alleged loss or damage, but the same had not been submitted to impartial arbitrators, nor was any award fixing the amount of the plaintiff's claim under the policy by reason of the alleged loss or damage made before the commencement of the suit.

There was no averment of a written request to refer the dispute.

There was a demurrer to the replication to this plea, but the plaintiff took no exception to the plea. At the trial the facts alleged in the plea were established, and the Judge entered a verdict for the defendants upon this plea. It appeared that no such written request to refer had been in fact made.

The Court of Queen's Bench made absolute a rule to enter a verdict for the plaintiff, holding that the defendants, not having complied with the statute 39 Vic. ch. 24, O., could not avail themselves of the condition.

The Court of Appeal, without pronouncing upon that question, held that the condition, even if valid, had not been broken, because there had been no written request to refer the dispute to arbitration; and therefore dismissed the appeal. *Ulrich* v. *National Insurance Co.*, 84.

2. *Statutory conditions—R. S. O. ch.* 162—*Powers of Provincial Legislature.*]—The policy sued on, which was issued by the defendants, who were incorporated since the passing of R. S. O., ch. 162, by the Dominion Parliament, had not endorsed upon it the statutory conditions referred to in the schedule to the above Act, but had conditions of its own which were not printed as variations in the mode indicated by the Act.

Held, affirming the judgment of the Court of Queen's Bench, 43 U. C. R., 261, that the defendants could not resort to their own conditions avoiding the policy for non-disclosure of a previous insurance, nor to the statutory conditions, as they were not printed on the policy.

Held, also, that R. S. O. ch. 162 was not *ultra vires*, as the Legislature of Ontario had power to deal with an insurance company incorporated by the Dominion Parliament in reference to insurances effected in Ontario and that a contract for insurance was not one affecting "Trade and Commerce."

Per *Burton*, J. A., that a person insured under such a policy is entitled to avail himself of any condition endorsed on the policy in his favour, or of any statutory condition notwithstanding that it is not printed upon the policy, but the assurers are only entitled to avail themselves of such conditions when they have them printed upon their policy.

Per *Spragge*, C., apart from conditions, an insurance company may defend on the ground of misrepresentation or concealment, which would vitiate the contract. *Parsons* v. *The Citizens' Ins. Co.*, 96.

Affirmed on appeal to the Supreme Court.

3. *Statutory conditions—R. S. O. ch.* 162.]—The action was brought on an interim receipt for insurance against fire issued by the defendants after the passing of R. S. O., ch. 162, which stated that the plaintiff was insured subject to all the covenants and conditions of the company. No conditions were on the interim receipt. *Held*, affirming the judgment of the Queen's Bench, 43 U. C. R. 271, that whether the receipt was to be treated as a contract *in fieri* forming the equitable foundation for the issue of a policy, or as a concluded contract, R. S O. ch. 162 applied and that the plaintiffs could not therefore resort to their own special conditions for the purpose of defeating the claim, or to the statutory conditions.

Held, also, that the fact that the defendants were a company formed under an Imperial Act was immaterial, as under the B. N. A. Act the Local Legislature had power to prescribe the terms upon which insurance companies, either foreign or domestic, shall carry on business within the limits of the Province.

The power to legislate upon the subject of insurance is not vested in the Dominion Parliament by virtue of its powers to pass laws for the regulation of "Trade and Commerce" under the 91st section of the B. N. A. Act, but belongs to the Local Legislature. *Parsons* v. *The Queen Ins. Co.*, 103.

Affirmed on appeal to the Supreme Court.

4. *Pleading—Condition precedent.*]—The declaration alleged that the policy sued on was subject to the conditions endorsed thereon, and averred a fulfilment of all the conditions necessary to entitle the plaintiff to maintain the action.

The defendants pleaded, that one of those conditions was that payment of the loss need not be made

until sixty days after the same should have been ascertained and proved, and that at the commencement of the action the alleged loss had not been ascertained and proved.

The plea was demurred to.

Held, reversing the judgment of the Queen's Bench, that the plea was good, inasmuch as it clearly appeared from the declaration and plea coupled together that the condition was precedent, and that it was not necessary in the plea to point out how the loss was to be ascertained and proved, that being a matter of evidence.

Held, following *Parsons* v. *Queen Insurance Co.*, 4 App. R. 103, that R. S. O. ch. 161, applied to the defendants, who were incorporated by the Parliament of Canada before Confederation, although their charter had since been amended by the Dominion Parliament. *Johnston* v. *Western Assurance Co.*, 281.

Affirmed on appeal to the Supreme Court.

5. *Mutual Ins.–Assignment of property insured–R. S. O. ch.* 161, *sec.* 41.]—The defendants' agent issued a thirty-day interim receipt to the plaintiff, and he assigned to one M., in trust for his creditors, the insured property which was destroyed by fire after the expiration of the thirty days. It appeared that the agent was expressly notified of the assignment, to which he assented, stating that no notice to the company was necessary.

No application was made under sec. 41 of R. S. O. ch- 161, to ratify the insurance to the alienees, and the policy issued, in the terms of the application, to the plaintiff.

Held, reversing the judgment of the Common Pleas, that the plaintiff was not entitled to recover, as the notice of assignment, even if given to the company, would only have been notice that the property had been alienated, which, under the above section, rendered the insurance void. *McQueen* v. *The Phœnix Mutual Ins. Co.*, 289.

Reversed on appeal to the Supreme Court.

6. *Fire—Payment of losses under 36 Vic. ch.* 44, *sec.* 52 *O.—Notice of assessment—Mutual Ins. Co.—Statutory conditions.*] — Under the terms of a mutual insurance policy the losses were only to be paid within three months after due notice given by the insured according to the provisions of 36 Vic. ch. 44, sec. 52 O., which enacts that in case of loss by fire, notice thereof shall be given to the secretary of the company forthwith, and the proofs, &c., called for by the policy must be furnished to the company within thirty days after said loss, "and upon receipt of notice and proofs of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after the receipt by the company of such proofs.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 102, that a defence under this section was not open upon the pleadings, which are set out in the case; and an amendment was, under the circumstances, refused.

Semble, without deciding whether the above statute—the Mutual Insurance Companies' Act—was superseded by 39 Vic. ch. 24, O.. that even if this defence were available, it would not entitle the defendants to succeed, as the above section does not prevent an action being brought before the expiration of three months where the directors have refused, as they did in this case, to pay the claim.

The defendants had refused to accept a new trial on the plea of arson, which the Court below offered them upon their consenting to abandon all other defences, and the Court of Appeal declined to interfere by granting it.

A notice of assessment mailed on the 12th February, requested payment to be made on the 24th of the same month.

Held, that on this and other grounds stated in the case, the assessment was invalid, as under secs. 43 and 45, the day named in the notice for payment must be at least thirty days subsequent to the mailing. *Frey* v. *Wellington Mutual Ins. Co.* 293.

Reversed on appeal to the Supreme Court.

7. *Insurance—Prior and subsequent insurance.*]—Where an applicant for insurance in answer to the question, "What other insurance, if any, is there upon the property, and in what office?" replied, shewing four existing insurances of $2,000 each, but by mistake mentioned the name of the Canada Fire and Marine Insurance Company, as one of them, instead of the Provincial.

Held, reversing the judgment of the Queen's Bench, 43 U. C. R. 603, that under the 8th statutory condition the policy was void.

After the issue of the policy, the insured allowed one of the above policies to drop, and substituted another for a similar amount in a different company.

Held, that the policy was also avoided by the non-communication of this new insurance.

Unnecessary length of appeal books remarked upon. *Parsons* v. *The Standard Insurance Company*, 326.

Reversed on appeal to the Supreme Court.

8. *Loss, if any, payable to third party — Cancellation.*]—The plaintiffs effected an insurance with defendants, "loss, if any, payable to H." as security for any balance of account that might be due H.

Held, affirming the judgment of the Queen's Bench, 43 U. C. R. 556, that H., in the absence of authority from the plaintiffs, had no power to surrender the policy for cancellation before any loss had happened, and that on the evidence no such authority was shewn. *Marrin et al.* v. *Stadacona Ins. Co.*, 330.

9. *Married woman—Insurable interest of—Representation as to title—Unreasonable condition.*]—A gift by a married woman to her husband of her separate property, must be established by clear evidence of her intention to destroy the separate use.

Defendants insured the plaintiff, a married woman, for $1,000, on a general stock-in-trade of groceries, which had been bequeathed to her for her sole and separate use. After the testator's death, her husband, who was the sole executor of the will, carried on the business in his own name with her acquiescence.

Held, affirming the judgment of *Spragge*, C., that she had an insurable interest in the goods which the husband clearly held as trustee for her.

When the fire occurred only $667 worth of the original goods remained in specie, but other goods had been purchased in the course of business, and the stock was then really worth $2,800,

Held, that the plaintiff was entitled to recover the full amount of the policy.

The policy was for $1,000 on the stock-in-trade, and $100 on shop fix-

tures, in a building described. One question in the application required the applicant to state the nature of her title, whether fee simple, leasehold, or by bond or agreement, and if others were interested to give names, interest, and value. To this she answered "Fee Simple." *Held*, that the questions did not relate to the title to the goods, and that there was no misrepresentation.

A condition was added by the company that if the assured should make any misrepresentation or concealment, or omit to make known any fact material to the risk, or make any untrue statement as to ownership or title, the policy should be void—without providing, as in the statutory condition, that such misrepresentation must be material to the risk, and should void the insurance only as to the property affected by it.

Per *Patterson*, J., agreeing with *Spragge*, C., such condition was unreasonable, and was in effect declared to be so by the statute. *Butler* v. *Standard Fire Ins. Co.*, 391.

See Bankruptcy and Insolvency, 10.

INTEREST.

Promissory note—Rate of interest recoverable after judgment—Merger.]—Where a note is made payable at a large rate of interest *till paid* the holder is entitled to enforce payment with interest at that rate until judgment on an action thereon; but after judgment interest at six per cent. only is recoverable.

In this case the holder of such a note held a mortgage as collateral security containing a covenant equivalent in its terms to the promise in the note:

Held, that the right to recover interest at the larger rate named in the covenant was not merged in a judgment recovered on the note. *St. John* v. *Rykert*, 213.

Insurable, of married women.]—*See* Insurance, 9.

JOINT STOCK COMPANY.

Assignment in insolvency by directors.]—*See* Bankruptcy and Insolvency, 12.

JUDGMENT.

Judgment recovered for mortgage debt—Sale of equity of redemption and legal estate together—R. S. O. ch. 66, *sec.* 35—*Purchase by judgment creditor.*]—S., at the time of his death, owned a farm of 98 acres, 25 of which he had mortgaged. After his death his mortgagee recovered against his executor two judgments, viz., one in the County Court for the mortgage debt, and one in the Division Court for a debt not due by S. in his lifetime, and for which, therefore, his lands were not liable to be sold. The judgment plaintiff, having transferred his Division Court judgment to the County Court, issued executions on both judgments, under which the sheriff offered for sale the interest of S., the testator, in the 98 acres. The judgment plaintiff became the purchaser, bidding just enough to cover the amount of his two judgments and the costs, but not paying or intending to pay any money except the amount of the sheriff's fees.

Held, that by a sale of the testator's interest in the 98 acres, the equity of redemption in the 25 acres would have passed along with the legal estate in the 73 acres, under R.

S. O. ch. 66, sec. 35: but that no real sale had taken place, and therefore the sheriff's deed, made to the judgment plaintiff in pursuance of his bid, was void.

In the County Court suit the summons was addressed to W. M. Platt, executor of the last will and testament of S., deceased. The particulars of claim were for $200, on a mortgage made by S. in his lifetime, &c., and the judgment was that P. do recover against the said W. M. Platt, executor.

Held, that the fact that the summons was not addressed to Platt *as* executor, and the judgment was not expressed to be against him as executor, did not make this a judgment against him personally, and that it was sufficient to warrant an execution against the lands of the deceased.

Brown v. *Bacon*. 16 Gr. 472, and *Wood* v. *Wood*, *Ib*. 471, questioned.

Per Patterson, J. A.—If the sale could not have been upheld under the statute because of the legal and equitable estate being sold together, yet the sale might be upheld as to the legal estate.

Per Moss, C.J.A.—In such a case the sale could not be upheld in part but was void *in toto*. *Samis* v. *Ireland*, 118.

Rate of interest on promissory note recoverable after]—*See* INTEREST.

See FOREIGN JUDGMENT.

JURISDICTION.

Summary, of Insolvent Court.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

Of Local Legislature.]—*See* INSURANCE, 2, 3.

Of assignee.] — *See* BANKRUPTCY AND INSOLVENCY, 10.

LANDLORD AND TENANT.

See BANKRUPTCY AND INSOLVENCY, 8.

LEGISLATURE.

Powers of Provincial — *See* INSURANCE, 2, 3.

LETTERS.

Contract by.]—*See* SALE OF GOODS.

LIEN.

For advances by partner.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

LIMITATIONS, STATUTE OF.

Statute of Limitations—Possession as caretaker—Tenancy at will—Subsequent entry of owner—Creation of new tenancy.]—In 1849, the plaintiff's father, who owned a block of four hundred acres of land, consisting of lots 1 in the 13th and 14th concession of Wellesley, offered him the choice of 100 acres, if he would live on it and take care of the remaining three hundred acres. The plaintiff selected the south half of lot 1 in the 13th concession, and lived thereon, taking care of the residue of the block till 1864, when he sold his 100 acres and moved on the north half of this lot 1, where he resided ever since. The father died in 1877, having devised the north half of this north half to the defendant, another son, and the south half thereof to the plaintiff. The defendant claiming under the devise entered, whereupon the plaintiff brought trespass, claiming title by possession. It appeared that the plaintiff had erected buildings on the land in question, and cleared and cultivated it, taking the profits to his own use; and since 1865 the lot had been assessed in his name, and he had paid the taxes

thereon. The plaintiff occasionally visited his father and told him what improvements he was making on the lot. The defendant swore that in 1871 he was sent by his father to the plaintiff to remonstrate with him for cutting timber and destroying the land, and to tell him if he did not pay the taxes he would give the land to some one else; and that the plaintiff promised to cut no more and to pay the taxes.

Held, reversing the judgment of the Common Pleas, 29 C. P. 449, *Patterson*, J.A., dissenting, that the plaintiff held the land in question as tenant at will, not as caretaker and agent of his father, and that there had been no determination of the original tenancy, without which a new tenancy could not be created, and that he was therefore entitled to recover.

Per Patterson, J.A., that it was not necessary to shew a substantive act determining the tenancy, as for the purposes of the statute, a tenant at will ceases to hold as such at the end of the first year; and that what took place between the plaintiff and defendant was sufficient to prove a new tenancy at will. *Ryan* v. *Ryan*, 563.

This case has been carried to the Supreme Court.

See ACCOUNT.

LOCAL LEGISLATURE.

Jurisdiction of.]—*See* INSURANCE, 2, 3.

LUNATIC.

Lunatics estate—Final order of foreclosure—Committee — Security.] —*Held*, affirming the decree of *Spragge*, C., following *Gunn* v. *Doble*, 15 Gr. 655, and *McLean* v. *Grant*, 20 Gr. 76, that a sale in 1854 by a mortgagee who had obtained a final order of foreclosure of real estate of a lunatic, valid on its face, could not be questioned by reason of a prior formal defect discovered a number of years afterwards.

The committee of the lunatic filed a bill for redemption against the mortgagee, the representatives of the purchaser from him under a final order of foreclosure, and H. the committee, who executed the mortgage, alleging that the mortgage was executed before H. had given security. The objection to the security was that the attestation clause of the recognizance filed by H. was not signed by any Judge of the Court. It appeared, however, that the affidavits of justification were duly sworn, and each page of the mortgage was authenticated by the signature of the Chancellor.

Held, that 9 Vic. ch. 10, which provided for security being given, was only intended to apply to cases where the committee was appointed by the Master, and not as here, by the Court, who have a discretionary power to authorize a committee to act before giving security.

Held, also, that the security was only against the missapplication of the personalty, and was not directed against a mortgage executed under the authority of the Court.

Held, also, that the requirements of the statute as to security were only directory, and that a failure to comply therewith would not invalidate acts done by a person who had been actually appointed. *Shaw* v. *Crawford, et al.*, 371.

MARRIED WOMAN.

Liability of, to be placed in insolvency.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

Insurable interest of.]—*See* INSURANCE, 9.

MASTER.

Reversal of Master on questions of fact — Circumstances under which the finding of the Master upon questions of fact will be reversed.

Upon the evidence, which is fully set out in the case, the finding of *Proudfoot*, V. C., that $3,000 was advanced by the plaintiff to the defendant upon a mortgage for that amount, instead of $500, as contended by the defendant, was affirmed, but the Master's finding, which the Vice-Chancellor had adopted, that the note for $510 had not been paid, was reversed. *St John* v. *Rykert*, 213.

MERGER.

See INTEREST.

MISDEMEANOUR.

See HABEAS CORPUS.

MONEY.

Paid under a mistake—Recovery of.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

MORTGAGE.

Sale of insolvent's interest in.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

Fraudulent.] — *See* BANKRUPTCY AND INSOLVENCY, 11.

NEGLIGENCE.

Liability of Railway Co. for.]—*See* RAILWAYS AND R. W. COS.

NEW TRIAL.

See TRINITY TERM.

NOTICE.

See PURCHASE FOR VALUE WITHOUT NOTICE.

PARLIAMENT.

1. *Election trial — Admissions—Counting ballots—Evidence as to how voter voted.*]—Admissions duly made upon an election trial may be acted upon as evidence of the facts admitted; but admissions as to how certain voters, whose ballots had been lost, voted, made before the registrar, when both parties were acting under the erroneous assumption that he had power to count the ballots, were held to be not binding.

Where it can be ascertained, by taking into account the number of votes proved by inspection of documents to have been cast for each candidate, and the whole number cast, and as a matter of mere calculation that certain persons have voted and for which candidate they voted, these votes may, on this evidence, be counted for the candidate for whom they were cast.

The statement of a voter cannot be received as evidence that he voted or for whom he voted, either by proving statements so made or by calling the voter as a witness.

The petitioner, being bound to establish affirmatively that the party for whom he claims the seat was duly elected, cannot diminish the respondent's majority by the votes of those who have been held not entitled to vote, when owing to the loss of papers and inadmissibility of other evidence it cannot be ascertained for

whom they voted. *Re Lincoln Election Petition*, 206.

2. *Dominion Controverted Election Act — Preliminary objection — Appeal.*]—*Held*, that an appeal does not lie to this Court from a judgment of the Court of Common Pleas overruling a preliminary objection as to the jurisdiction of the Court to try a controverted election for the Dominion. *In re Niagara Election*, 407.

3. *Dominion Elections Act of* 1874, *sec.* 73—*Striking off corrupt votes.*]—Sec. 73 of the Dominion Elections' Act of 1874, which provides for striking off votes equal in number to the corrupt votes, only applies where the seat is claimed.

The clauses in the petition herein which did not claim the seat, framed under the above section, were therefore struck out, with costs to the respondent. *Re East Elgin Election Case*, 412.

4. *Corrupt practices —Status of petitioner—Preliminary objections.*]—The fact that a petitioner in an election petition, with regard to the Ontario Legislature, has been guilty of corrupt practices during the election, is no objection to his *status* as a petitioner.

As the Ontario Election Act, R. S. O. ch. 10, makes no provision, as the Dominion Act does, as to the time within which preliminary objections must be taken, the special circumstances of such an application must determine whether it is made with sufficient promptitude. *Re Dufferin Election Case*, 420.

PAROL EVIDENCE.

See Account—Railways and R. W. Cos.—Wills, 1—Bills of Exchange and Promissory Notes, 1.

PARTNER.

Lien of, for advances.]—*See* Bankruptcy and Insolvency, 4.

Proof for, by retiring for balance due.]—*See* Bankruptcy and Insolvency, 6.

PARTNERSHIP.

Partnership—Dissolution—Registration under 33 *Vic. ch.* 20.]—T. N. trading in co-partnership with J. B. N. under the style of T. N. & Son, retired from the firm, which had been registered in accordance with the Registration Act of 1869, 33 Vic. ch. 20, under an agreement that J. W. should succeed him; that the style of the new partnership which was to be composed of J. B. N. and W., should be N. & Co., and that the new firm should assume all the liabilities of the old to its creditors; but no declaration of this change was filed. Subsequently a note was signed by J. B. N. in the name of T. N. & Son, and accepted by the the plaintiffs, who knew that the firm of T. N. & Son had been dissolved, in renewal of certain notes made before the retirement of T. N.

Held, in the Queen's Bench, 43 U. C. R. 447, that there was merely a change in the membership and alteration in the name of the partnership, which should have been registered under the statute, and that T. N. therefore was liable.

Held, in the Court of Appeal, reversing this judgment, that the evidence shewed an entire dissolution to which 33 Vic. ch. 20, did not apply, and that T. N. was therefore not liable. *Bank of Toronto* v. *Nixon et al.*, 346.

PETITIONER.

Status of.]—See PARLIAMENT, 4.

PLEADING.

See FOREIGN JUDGMENT—INSURANCE, 1, 4.

POLICE MAGISTRATE.

See HABEAS CORPUS.

POSSESSION.

See LIMITATIONS (STATUTE OF).

PREFERENCE, FRAUDULENT.

See BANKRUPTCY AND INSOLVENCY, 1, 11.

PRELIMINARY OBJECTION.

See PARLIAMENT, 2, 4.

PRESBYTERIAN CHURCH.

Presbyterian Church of Scotland—Union—Congregational property—38 Vic. ch. 75, O.]—In 1836, by letters patent, lands were granted to trustees in fee, to hold the same "to, and for the benefit of the Presbyterian minister for the time being incumbent of the Presbyterian Church of Scotland, now erected in the township of Eldon." The defendant was incumbent of said church when, in 1874, as mentioned in 38 Vic. ch. 75, O., the several Presbyterian Churches in Canada were united; but the members of this church decided not to enter into the union, in accordance with section 2 of the Act, which provided that, in such a case, the "congregational property of that congregation shall remain unaffected by this Act." The defendant, however, became a member of the united church.

Held, affirming the decree of *Moss*, C. J. A., 26 Gr. 141, that the lands in question were congregational property within the meaning of sec. 2, and that the defendant, having joined the union, was no longer entitled as *cestui que trust* under the patent. *McPherson* v. *McKay*, 501.

PRINCIPAL AND SURETY.

Principal and surety—Giving time to one of three executors.]—The testator, who was surety in a covenant for the payment by the defendant S. to the plaintiff of a sum of money, died leaving a will, by which he appointed S. and the other two defendants executors. After his death, S., on his own behalf, made various payments on account of the debt, and being unable to pay the balance when due, he got the plaintiff to take his promissory note therefor, S. having arranged with his bankers to discount this note upon its being endorsed by the plaintiff, and the plaintiff received the money thereon. When the note matured part of the amount was paid by S., and the balance renewed from time to time by notes of S. endorsed by the plaintiff as before, and the last renewal being unpaid, the plaintiff sought to recover the amount from the defendants as executors. In the dealings between the plaintiff and S. as to the promissory note, and the various renewals, no reference was made to the estate of the surety or to the covenant, and the co-executors of S. had no notice of such dealings.

Held, affirming the judgment of the Common Pleas, that the estate of the surety was released from liability by the dealings between the plaintiff and S. *Austin* v. *Gibson et al.*, 316.

PROVINCIAL LEGISLATURE.

Power of.]—*See* INSURANCE, 2, 3.

PURCHASE.

Of equity of redemption and legal estate by judgment creditor.]—*See* JUDGMENT.

PURCHASE FOR VALUE WITHOUT NOTICE.

Purchase for value without notice—Registration—Right to amend—A. J. Act. sec. 50.]—The bill, which was filed against McF., R., McK., and B., alleged that a deed made by the plaintiff and her husband in 1866 to McF., although absolute in form, was made only as security for a loan of $500, from McF. to the plaintiff: that McF. sold to R. and M., who took with notice of the plaintiff's right to redeem: that R. and M. sold the land to B, who took with notice, and that B. gave back a mortgage to secure part of the purchase money, which was still unpaid, and had been assigned to one Watson. The defendant B., admitted by his answer the alleged character of the conveyance from the plaintiff to McF., and that the sale by McF. to R. and M. was in fraud of the plaintiff; but he denied notice of the plaintiff's claim, and alleged that he was a purchaser for value without notice.

At the hearing, B., who was the only appellant, made an application for leave to file a supplemental answer, setting up the facts shewn by the evidence, that his deed from R. and M., and their deed from McF., as well as his deed from the plaintiff, had been duly registered, which was refused.

A decree was made declaring that the conveyance to McF. was only as security for the repayment of the $500: that R. and M. bought with actual notice of the plaintiff's claim, and that B. bought from them with actual notice.

It did not appear whether the decision was on the ground that B. had actual notice when he purchased, or that B., not having paid his purchase money, was unable to plead purchase for value without notice.

Held, (*Proudfoot*, V.C., dissenting,) that the evidence did not shew that B. had actual notice of the plaintiff's claim when he purchased: that the amendment should have been allowed, and that this Court had power now to allow it under the A. J. Act, sec. 50; but as it would not be proper to conclude the plaintiff without an opportunity of producing further evidence, the case was sent down for another hearing

Per Patterson, J.A.—The provisions as to amendments in R. S. O. ch. 49 sec. 8, and in R. S. O. ch. 50, sec. 270, are *in pari materia*, and the suitor's rights to claim an amendment are the same whether at law or in equity.

Per Proudfoot, V.C.—That the permission to amend was in the discretion of the Judge, and that the Court should not interfere with his decision.

Observations as to the policy of the former rule (now abolished by R. S. O. ch. 59, sec. 9,) that a purchaser

who had not paid all his purchase money, could not avail himself of the defence of purchase for value without notice. *Peterkin* v. *MacFarlane et al.*, 25.

RAILWAYS. & R. W. Cos.

R. W. Co. — Agreement — Additional parol term—Conditions—" At owner's risk "—Liability for negligence.]—The plaintiffs sued the defendants for breach of a contract to carry a quantity of petroleum in covered cars from London to Halifax, alleging that they so negligently carried the same that it was exposed to the weather and destroyed. It appeared that the plaintiffs had a large quantity of oil to send, and agreed verbally with the defendants' agent at London for its carriage, and that it should go in covered cars. The first cargo was shipped on a request note signed by the plaintiffs, and a corresponding receipt signed by the defendants, by which they undertook to carry it subject to the terms and conditions endorsed, one of which was, that " oil will under no circumstances be carried, save at the risk of the owners." Nothing was said in the receipt about covered cars, and the oil was carried in open cars, in consequence of which a large quantity was lost.

Held, that, even if the verbal evidence was admissible to prove a contract to carry in covered cars, the defendants were not liable thereon, as the agent had no authority to make such a contract; but, *Held*, also, affirming the judgment of the Common Pleas, 28 C. P. 586, that they were guilty of negligence, liability for which the condition did not exempt them ; and that the declaration could be amended accordingly.

Held, also, that the company might, by a condition properly framed, have exempted themselves from liability for such negligence.

Per Moss, C J. A., the verbal evidence was admissible, as the nature of the transaction shewed that the parties did not intend the documents to contain the whole contract.

Per Burton, J. A., it was inadmissible, as there was no sufficient evidence to shew that the parties did not so intend.

Remarks upon the term " gross negligence." *Fitzgerald et al.* v. *The Grand Trunk R. W. Co*, 601.

This case has been carried to the Supreme Court.

See ARBITRATION.

REGISTRATION.

Under 33 *Vic. ch.* 20.]—*See* PARTNERSHIP, 1.

See PURCHASE FOR VALUE WITHOUT NOTICE.

RENT.

Claim for.] — *See* BANKRUPTCY AND INSOLVENCY, 8.

REPAIR.

See HIGHWAYS.

REPRESENTATION.

As to title.]—*See* INSURANCE, 9.

RESTRAINT UPON ALIENATION.

See WILL, 2.

SALE OF GOODS.

Acceptance—Contract by letters—Construction of.]—In the construction of a contract by letters it is not necessrry that there should be an express assent, but the requisite assent may be collected by implication from the whole terms of the correspondence.

In reply to an offer by the defendants for the sale of certain wheat, the plaintiffs telegraphed: "Will take your five cars at 85 cents per bushel," to which the defendant replied by postal card on the 25th of July: "Send instructions for the shipment of the five cars spring." On the 26th the plaintiff mailed a postal card with instructions, but this was never received by the defendants. A shipping note mailed on the 27th however reached the defendant on Monday the 29th, but he had sold the wheat on the 27th.

Held, affirming the judgment of the County Court, that the postal card sent by the defendant on the 25th of July amounted to an absolute acceptance and not merely a conditional acceptance should the defendant be satisfied with the instructions he might receive as to the mode of shipment.

Held, also, that even if the plaintiff did not send instructions till the 27th the delay would not have enabled the defendant to treat the contract as cancelled.

Held, also, that the plaintiff was entitled to recover as damages the amount which he had to pay for additional carriage on wheat which he was forced to buy in a more distant market in consequence of the defendant's breach of contract. *Bruce* v. *Tolton*, 144.

SECURITY.

Of committee of lunatic.] — *See* LUNATIC.

Realization of, by creditor.]—*See* BANKRUPTCY AND INSOLVENCY, 5.

SEPARATE TRADING.

Of married women.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

SEIZURE.

See EXECUTION.

STATUTES.

Construction of.]—*See* BANKRUPTCY AND INSOLVENCY, 10, 12—LUNATIC.

9 & 10 Wm. III. ch. 15.]—*See* ARBITRATION.

23 Vic. ch. 24, sec. 1.]—*See* FOREIGN JUDGMENT.

29 & 30 Vic. ch. 45.]—*See* HABEAS CORPUS.

31 Vic. ch. 1, sec. 6, sub-sec. 34.]—*See* FOREIGN JUDGMENT.

31 Vic. ch. 7, O.]—*See* FOREIGN JUDGMENT.

31 Vic. ch. 48. D.]—*See* BANKRUPTCY AND INSOLVENCY, 10.

32 Vic. ch. 20.]—*See* HABEAS CORPUS.

32 Vic. ch. 36, sec. 128.]—*See* ASSESSMENT AND TAXES.

32 & 33 Vic. ch. 13, D.]—*See* BANKRUPTCY AND INSOLVENCY, 12.

33 Vic. ch. 20.]—*See* PARTNERSHIP.

36 Vic. ch. 44, sec. 52 O.]—*See* INSURANCE, 6.

36 Vic. ch. 48, sec. 373 O.]—*See* COMPENSATION.

37 Vic. ch. 47, sec. 2.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

38 Vic. ch. 20 D.]—*See* BANKRUPTCY AND INSOLVENCY 10.

38 Vic. ch. 47, D.]—*See* HABEAS CORPUS

38 Vic. ch. 75, O.]—*See* PRESBYTERIAN CHURCH.

39 Vic. ch. 24, secs. 43, 45, O.]—*See* INSURANCE, 6.

R. S. O. ch. 10.]—*See* PARLIAMENT, 4.

R. S. O. ch. 47, sec. 221.]—*See* BAILIFF.

R. S. O. ch. 50, sec. 270.]—*See* PURCHASE FOR VALUE WITHOUT NOTICE.

R. S. O. ch. 50, sec. 284.]—*See* TRINITY TERM.

R. S. O. ch. 66, sec. 35.]—*See* JUDGMENT.

R. S. O. ch. 161.]—*See* INSURANCE, 4, 5.

R. S. O. ch. 165, sec. 9, sub-sec. 15.]—*See* ARBITRATION.

R. S. O. ch. 174, sec. 456.]—*See* COMPENSATION.

R. S. O. ch. 174, sec. 491.]—*See* HIGHWAYS, 1.

Election Act of 1874, sec. 3.]—*See* PARLIAMENT, 3.

Insolvent Act of 1875.]—*See* BANKRUPTCY AND INSOLVENCY.

B. N. A. Act, sec. 91.]—*See* ASSESSMENT AND TAXES—INSURANCE, 3.

STATUTORY CONDITIONS.

See INSURANCE, 2, 3, 6.

STRIKING OFF CORRUPT VOTES.

See PARLIAMENT, 3.

SUMMARY JURISDICTION.

Of Insolvent Court.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

STAMPS.

Cancellation of.]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

SURETIES.

See PRINCIPAL AND SURETY.

SURPLUS.

Of Insolvent firm—Division of.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

TENANCY.

Creation of new.]—*See* LIMITATIONS, STATUTE OF.

TENANCY AT WILL.

See LIMITATIONS, STATUTE OF.

TITLE.

Representation as to.]—*See* INSURANCE, 9.

TRADE AND COMMERCE.

See INSURANCE, 2, 3.

TRINITY TERM.

Sittings of the Court dispensed with—When rule nisi to be moved—Power of Court.]—*Held*, affirming the judgment of the Common Pleas, 29 C. P. 347, that when the Court has dispensed with its sittings during Trinity Term, motions for new trials in cases tried at the Summer Assizes at Toronto, need not be made within the first four days of that Term, since under section 13 of R. S. O. ch. 39, such a motion may be made at any time during vacation (which includes Trinity Term) to a single Judge sitting for the Court. But if a party delays to move till after the fourth day of Trinity Term, he runs the risk of judgment being entered, (which may be done on the fifth day of that Term,) and if judgment is entered then, he is precluded from moving.

Per Burton, J.A.—Under R. S. O. ch. 50, sec. 284, the Court has no power to entertain such motions after the expiration of the four days mentioned therein.

Semble, per Patterson, J.A., that, notwithstanding that section, the Court still possesses a discretionary power in such cases. *Rooney* v. *Rooney*, 255.

VOTER.

Evidence as to how he voted.]—*See* PARLIAMENT, 1.

VOTES.

Striking off corrupt.]—*See* PARLIAMENT, 3.

WAIVER.

See EXECUTION.

WAY.

See HIGHWAY.

WILL.

1. *Description of land devised—Parol evidence.*]—The testator, who made his will in 1866, amongst other devises bequeathed "all my real estate situated in the township of Mono, in the county of Simcoe." It appeared that in 1862 he had purchased lots 1 and 2 in that township. In 1863 Orangeville was incorporated as a village and annexed to the county of Wellington, lot No. 1 being detached from Mono and comprised within Orangeville.

Held, affirming the judgment of the Common Pleas, 28 C. P. 406, that lot 2, which exactly fitted the devise, alone passed thereunder; and that parol evidence was inadmissible to shew that the testator intended to include lot 1 also. *Lawrence* v. *Ketchum*, 92.

2. *Construction of — Restraint upon alienation—Costs.*]—The testator, after devising the use and control of all his property, real and personal, to his wife until his two sons, W. and H., were twenty-one, divided his farm between W. and H., *to be* possessed by them when respectively of the full age of twenty-one, subject to certain legacies to his daughters. The will then proceeded, "also my two sons H. and W. above named, give my beloved wife a comfortable support, or the sum of ten pounds annually during her natural life, said support or annuity to commence at the time my said younger son H. shall possess his share of said property. I also will that my above-named sons W. and H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered.

Some years after attaining his majority, H. mortgaged to the defendant McAlpine without his mother's consent, and having made default in payment the land was advertised for sale.

Upon a bill filed by the mother, a decree was made, declaring that according to the true construction of the will H. had no power to sell, transfer, or mortgage the land in question without her consent in writing, and McAlpine was restrained from selling.

Held, reversing the decree of *Blake*, V.C., (without deciding whether such

a restraint upon alienation without a gift over was effectual, because the plaintiff had no right to require its determination, and if adverse to her contention such an opinion would not bind the heirs), that she was not entitled to reside upon the land, and thereby prevent its alienation, since there was the option of paying her in money, and the mortgage did not interfere with her right to this payment as a charge upon the land.

As the defendant had offered to give the plaintiff a decree for a charge on the land, she was ordered to pay the costs up to and inclusive of the decree; but the appellant, not having taken the objection which was given effect to in his reasons of appeal, was refused the costs of the appeal.

Observations on *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4; *Armstrong* v. *McAlpine et al.*, 250.

3. *Construction of.*]—The testator devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried, and upon her marriage the whole to be divided between her and her four sisters; but if she died unmarried the division was to be amongst her four sisters; and in case of either of these four dying before the marriage or death of C. the share of the one so dying was to go to the children. Then followed a provision that in case of the death of any of her *said* daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters and the children of deceased daughters.

Held, reversing the decree of the Court of Chancery, 26 Gr. 310, that it was the intention of the testatrix that there should be a distribution of the estate upon the marriage of C., and that on that event happening each of the daughters took an immediate absolute interest. *Munro et al.* v. *Smart et al.*, 449.

See EQUITABLE EXECUTION.

WORDS.

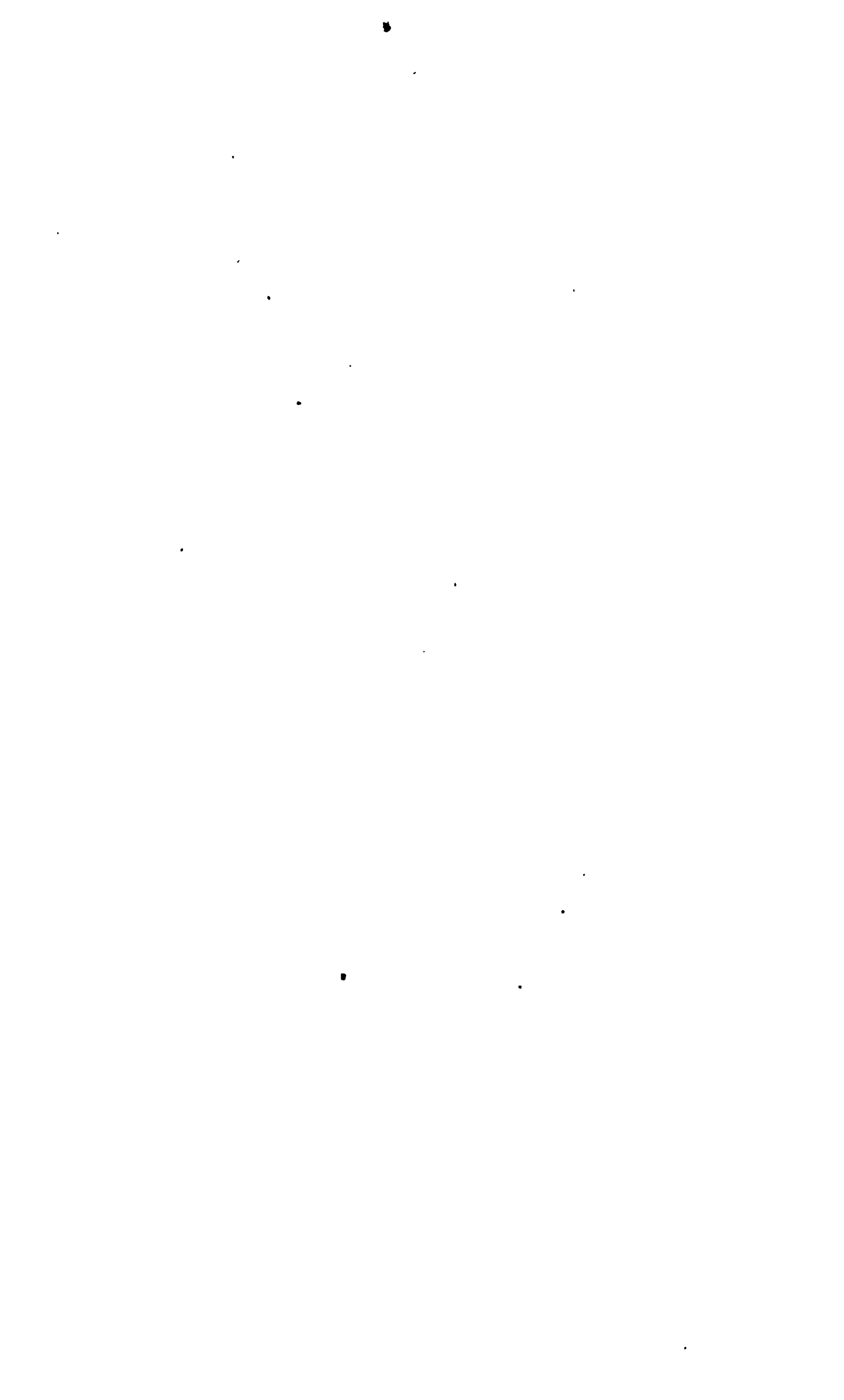
"Real estate."]—*See* BANKRUPTCY, AND INSOLVENCY, 3.

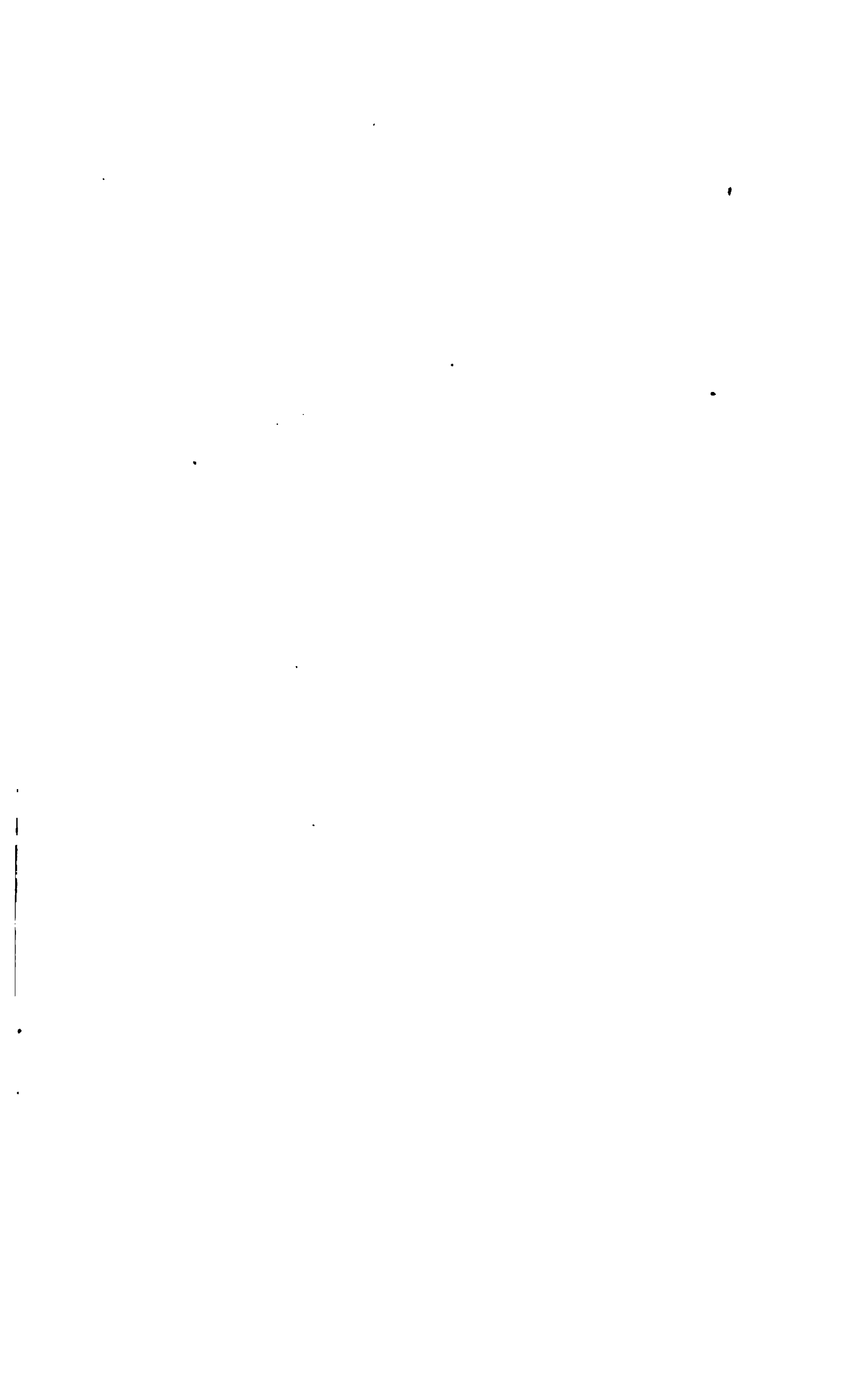
"Trade and Commerce."—*See* INSURANCE, 2, 3.

"Gross negligence."—*See* RAILWAYS AND R. W. COS.

"Injuriously affected."—*See* COMPENSATION.

"Existing right."—*See* FOREIGN JUDGMENT.





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